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DOCTOR OF PHILOSOPHY

The Interface between International and National Laws

The Role of National Water Laws and Institutions in Advancing the Implementation of and Compliance with International Obligations-A Nile Case Study

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**The Interface between International and
National Laws: The Role of National Water
Laws and Institutions in Advancing the
Implementation of and Compliance with
International Obligations-A Nile Case Study**

Musa Mohammed Abseno

**PhD in International Water Law and Policy
Graduate School of Natural Resources Law, Policy
and Management**

University of Dundee

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Signed Declaration for Submission of Postgraduate Thesis

I, the candidate, hereby declare that I am the author of this thesis, and that it has not been submitted for a higher degree. All references cited have been consulted unless otherwise stated, and the list provided.

Signed: 

Date: 19 April 2014

Signed Statement by Supervisor

I, the supervisor, hereby acknowledge that the conditions of the Ordinance and Regulations have been fulfilled.

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Thesis Abstract

The purpose of this research is to develop a coherent analytical framework for assessing the nexus between international and national law - based on the proposed case study for the implementation of the Nile River Basin Cooperative Framework Agreement (CFA) in Ethiopia and Uganda; and in order to draw lessons for other basins.

Chapter 1 introduces the scope of the research in general, and sets out the basic background on the subject in order to address the main research question: “How and to what extent, do

national laws and institutions support or hinder the implementation of and compliance with international obligations?”

Chapter 2 examines the scope and structures of basic substantive and procedural principles as well as basin-wide and subsidiary institutional structures incorporated in the Nile River Basin Cooperative Framework Agreement, and seek to confirm the viability of implementation with the support of the national legal systems.

Chapter 3 will assess the Ethiopian and Ugandan legal systems in order to determine the capacity of existing policies, laws, regulations and institutions in implementing the basic principles of international water law within the ambit of the CFA.

Chapter 4 considers procedural rules, such as general obligations to cooperate on data and information. The extent of support for the implementation of procedural rules within the national laws of Ethiopia and Uganda will be considered in order to ascertain whether the applicable international law and national law provides an effective interface in relation to data and information exchange. In this regard, the principles of planned measures and Environmental Impact Assessment (EIA) and audits are analysed in order to ascertain the extent of support and strength of the interface between international and national law.

Chapter 5 will consider the framework of institutional structures in the context of the basin-wide framework; sub-basin structures and the national institutional structures. The chapter seeks to analyze the appropriate supportive linkages between international river basin organizations and national institutions.

The findings of the analytical framework and the methodology employed will be analysed in chapter 6, in order to answer the key question: : “How and to what extent, do national laws and institutions support or hinder the implementation of and compliance with international

obligations?” This chapter will provide insights from the examination of the CFA and national laws and institutions to advance a framework for reviewing the international-national water law interface within transboundary river basins.

Chapter 7 recaps the analysis and findings of the thesis.

TABLE OF ABBREVIATIONS

AMCOW	African Ministers' Council on Water
CBD	Convention on Biological Diversity
CCE	Council of Constitutional Enquiry

CFA	Nile River Basin Cooperative Framework Agreement
CHM	Common Heritage of Mankind
DEA	Directorate of Environmental Affairs
DESS	Departments for Environmental Support Services
DOM	Department of Meteorology
DSS	Decision Support System
DWD	Department of Water Development
DWD	Directorate of Water Development
DWRM	Directorate of Water Resources Management
EAC	East African Community
EIA	Environmental Impact Assessment
EMCA	Environmental Management and Coordination Act
ENSAP	Eastern Nile Subsidiary Action Program
ENTRO	Eastern Nile Technical Regional Office

ENTRO	Eastern Nile Technical Regional Office
EPA	Environmental Protection Authority
EPA	Environmental Protection Authority
FAO	Food and Agricultural Organization
FSSD	Forestry Sector Support Department
HRC	Human Rights Council
ICJ	International Court of Justice
ICNL	International Centre for Not-for-Profit Law
IGADD	The Intergovernmental Authority on Drought and Development
IIL	Institute of International Law
ILA	International Law Association
ILC	International Law Commission
IP	Interim Procedures
IPCC	Intergovernmental Panel on Climate Change
JMP	Joint Multi-purpose Program

LVBC	Lake Victoria Basin Commission
LVEMP	Lake Victoria Environmental Management Project
MEA	Multilateral Environmental Agreement
MIS	Management Information System
MoARD	Agriculture and Rural Development
MoFA	Ministry of Foreign Affairs
MoFED	Ministry of Finance and Economic Development
MoWE	Ministry of Water and Energy
MoWR	Ministry of Water Resources
MWE	Ministry of Water and Environment
NAPE	Public of National Association of Professional Environmentalists
NBD	Nile Basin Discourse
NBI	Nile Basin Initiative

NDF	National Desk Forums
NELCOM	Nile Equatorial Lakes Council of Ministers
NELCU	Nile Equatorial Lakes Coordination Unit
NEL-CU	Nile Equatorial Lakes Coordination Unit
NELSAP	Nile Equatorial Lakes Subsidiary Action Program
NELTAC	Nile Equatorial Technical Advisory Committee
NEMA	National Environment Management Authority
NEPAD	New Partnership for African Development
CSOs	Civil Society Organizations
NFA	National Forestry Authority
NFP	National Focal Point
NRBAP	Nile River Basin Action Plan
NRBC	Nile Basin River Basin Commission
NWSC	National Water and Sewerage Corporation

ODI	Overseas Development Institute
OG	Operational Guidelines
OSSREA	Organisation for Social Science Research in Eastern
PASDEP	Accelerated and Sustained Development
PCIJ	Permanent Court of International Justice
PMU	Project Management Office
PRSP	Poverty Reduction and Sustainable Development Program
RBO	River Basin Organization
SADC	Southern African Development Community
SAP	Subsidiary Action Program
SVP	Shared Vision Program
TECCONILE	Technical Cooperation for the Promotion of the Development and Environmental Protection of the Nile Basin
UNEP	United Nations Environment Program

UNFCCC	United Nations Framework Convention on Climate Change
UNWCC	The United Nations Convention on the Law of Non-Navigational Uses of International Watercourses
UWASNET	Uganda Water and Sanitation NGO Network
WMD	Wetlands Management
WMO	World Meteorological Organization
WRPM-PMU	Water Resources Planning and Management Project Management Unit

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CHAPTER I

INTRODUCTION

International and national law have often been studied as separate branches of law with apparently little or no appreciation of the impact that one area has on the other. Doctrinal debates over their relationship have varied. Some commentators denote international law as mere rules of international morality rather than proper law.¹ Other writers consider international law as ‘an anarchic system relying on decentralized enforcement or self-help that primarily performs functions other than constraint.’² The claim that international law has little or no influence over municipal law, and as a result, cannot be invoked in municipal courts, defies the function of several international treaties conferring individuals with the right to bring actions against States.³ On the other hand, those who advocate the supremacy of domestic law over international law draw an erroneous legal conclusion: ‘that a country incurs no responsibility under international law when its municipal law violates international law to the injury of a foreign nation or its nationals.’⁴ Thus, States may invoke such reasons in order to justify sovereignty as an escape from the restraints of international law.⁵

However, the above opinions merely focus on the ‘varying preferences of their formulators about the relative roles of national and international law’⁶, which demonstrate an inadequacy and inaccurate description of reality with regard to the relationships between international and national laws.

¹ McDougal, M.S., ‘The Impact of International Law upon National Law: A Policy-Oriented Perspective’, 4 S.D. L. Rev. (1959) at 27.

² Whytock, C.A., ‘Thinking beyond the domestic international divide: Toward a unified concept of public law’, 36 Geo. J. Int’l L. (2004-2005) at 157.

³ Borchard, E., ‘*The Relation between International Law and Municipal Law*’, 24 Va. L.R. (1940-141) at 139.

⁴ Id., at 140.

⁵ For details, see Borchard, E., ‘*The Relation between International Law and Municipal Law*’, 24 Va. L.R. (1940-141) at 137-138.

⁶ McDougal, supra note 1 at 30-31.

The above analysis in turn begs for the examination of international obligations whether they may be supported or hindered by domestic laws. According to international law theory, international obligations originate from international treaties; international customs; general practice accepted as law; judicial decisions; and the teachings of the most highly qualified publicists.⁷ Treaties are the most formalized types of agreements governed by international law. This means, when States enter in to a treaties that meet certain formalities or that evidence a certain intent, they put themselves under an obligation to comply with them. The notion of *pacta sunt servanda* requires that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”⁸ It is accepted that obligations under a treaty or treaties may derogate from customary international law.⁹ There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required by that obligation, regardless of its origin or character. (Article 12)¹⁰

A breach by a State of an international obligation incumbent upon it gives rise to international responsibility.¹¹ Such responsibility cannot be disbursed without a legal and institutional framework capable of facilitating the performance of international obligations at the domestic level. Accordingly, the issue of the relationship between international law and national law and the critical juncture or a point of departure in their relationship cannot be ascertained within the context of separate analysis of the two systems; rather as an integrative approach can offer insight in to the understanding of whether national laws can support or hinder international obligations.

⁷Beckman R. and Butte D., *Introduction to International Law*, available at <http://www.ilsa.org/jessup/intlawintro.pdf>, accessed on 05 December 2013 at 3.

⁸ Id.

⁹ Id.

¹⁰Article 12, Responsibility of States for Internationally Wrongful Acts, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10). Text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001; available at <http://www1.umn.edu/humanrts/instree/WrongfulActs.html>, accessed on 05 December 2013.

¹¹ Id., Article 2.

Today's reality shows that the proliferation of basic international obligations among States through multilateral and bi-lateral international treaties has increased the requirement for harmonisation of international commitments with the domestic legal systems.¹² Accordingly, the modern school of thought refutes the notion of conflict between international law and national law as a conflict of obligations.¹³ Instead, a proper understanding of their interface suggests that; 'the two legal orders...complement one another as a unified and coherent set of legal rules and principles.'¹⁴ The progressive development of international law as part of the new global order, therefore, necessitates an integrative approach, where States are required to commit themselves to both international and domestic laws.¹⁵ The relationship between international and national laws is particularly relevant with regard to issues involving water resources crossing national boundaries, where its governance requires both international agreements providing rights and obligations, and domestic laws that can support their implementation.

The purpose of this thesis is, therefore, to explore the connection between international legal commitments and national legal systems through analysis of national legal systems in Ethiopia and Uganda within the context of implementation of international water law principles; and in so doing develop a thesis supporting integrative approach that can provide an insight in to whether national laws support or constrain the implementation of international law. The nexus and possible gaps between the two sets of laws are examined within the context of the Nile River Basin Cooperative Framework Agreement (CFA) and the existing applicable national laws in Ethiopia and Uganda.

¹² See Armand de Mestral & Fox-Decent, E., '*Rethinking the Relationship Between International and Domestic Law*', 53 McGill L. J. (2008) at 577-578.

¹³ Wallace and Martin Ortega quote to 'Fitzmaurice compromise' as a way forward for harmonization between the two systems. See Wallace, R.M. & Martin-Ortega, O., '*International Law*', Sixth Ed., Sweet & Maxwell, (2009), at 38-39.

¹⁴ Id.

¹⁵ Okoye, F.C., '*International Law and the New African States*', Sweet & Maxwell, London, (1972) at 44.

1.1 Justification

1.1.1 The need for interface between international and national laws

Many international treaties incorporate provisions requiring adjustments to national laws and institutions for implementing international obligations to which parties have agreed. In the case of international watercourse agreements, a number of core principles, such as the principle of equitable utilization, no significant harm, and procedural obligation on planned measures, hold provisions requiring interface with national laws in the implementation of the respective provisions.

The provisions may recommend one or many existing state practices for incorporating international commitments into the national laws; among them, harmonization of existing laws, implementing legislations, or repeal of laws creating obstacles for the implementation of international commitments.

However, the issue of interface between international and national laws has not been sufficiently addressed in a manner that fosters compliance with international commitments. It is, therefore, justified to emphasise the need for greater attention to the interface and implementation of international obligations within the context of trans-boundary water agreements; although such analysis is overdue. This approach can also help to overcome the long standing doctrinal positions, where upper riparian states have viewed international obligations as restraining their rights of use of international watercourses within their national jurisdiction, while¹⁶ downstream states erroneously demand the right to the natural flow of an entire international watercourse, which impinges on the rights of upstream states to the use of their part of water resources.¹⁷ By exploring the national laws supporting or impeding international commitments, extreme positions creating obstacles to the development of

¹⁶ Van Alstyne, W., '*International Law and Interstate River Disputes*', 48 Cal. L Rev., 1960 at 603.

¹⁷ Berber, J., '*River in International Law*', in Keeton, G. & Schwarzenegger, G., (ed.), London, (1959) at 20.

national implementation of international commitments or hindering the linkages between international and national laws can be identified. This may ultimately enhance the input international commitments can offer in addressing trans-boundary water disputes and the role domestic laws and institutions can play in facilitating their implementation.

1.1.2 The need for a holistic study of trans-boundary waters

The need for a holistic study of law (international and national) within the context of trans-boundary waters can be related to the notion of the concept of the ‘drainage basin’, which is the basis for an ecosystem approach and that calls for a multipurpose use, environmental concerns, and recognition of the interaction between water and land development.¹⁸ This approach can be realized through positive interactions of international and national law. Moreover, a holistic approach to international and national law underpins the concept of Integrated Water Resources Management (IWRM); which is defined as: ‘a process which promotes the co-ordinated development and management of water, land and related resources, in order to maximize the resultant economic and social welfare in an equitable manner without compromising the sustainability of vital ecosystems.’¹⁹

The universal support for a holistic approach gathered from Agenda 21 of the 1992 UN Conference on Environment and Development (UNCED) calls for ‘the application of integrated approaches to the development, management and use of water resources.’²⁰ According to Korhonen ‘unless national and international conservation measures reflect the interdependent links that characterize riverine ecosystems, efforts to protect and restore their

¹⁸ Teclaff, L.A., ‘Evolution of the River Basin Concept in National and International Water Law’, 36 Nat. Resources J. (1996) at 360.

¹⁹ Integrated Water Resources Management in Action, WWAP, DHI Water Policy, UNEP-DHI Centre for Water and Environment, (2009) at 3. Available at <http://unesdoc.unesco.org/images/0018/001818/181891E.pdf>, accessed on 28 Nov. 2012.

²⁰ Chapter 18, Agenda 21: A Programme for Action for Sustainable Development, Rio de Janeiro, Brazil, Jun. 13, 1992 in Report of the United Nations Conference on Environment and Development, Annex II, U.N. Doc. A/Conf.151/26 (Vol. II) (1992).

biodiversity will prove superficial.’²¹ Thus, ‘the protection of riverine ecosystems involves across jurisdictional boundaries, different regulatory regimes.’²² According to Professor McCafrey, ‘a number of States have accepted what might be termed a ‘holistic approach’, both in official statements and in their treaty practice.’²³ It is, therefore, important to note that the requirement of implementation of international water law commitments depended on greater coherence, based on a reciprocal responsibility between international and national legal arrangements.²⁴

1.1.3 The implementation of international legal commitments and the national legal framework

Water is a shared resource situated within national territory and across political boundaries, serving human interdependence on agriculture, industry, households and the environment.²⁵ National legislation is employed to govern domestic competing water uses, while equivalent legal or institutional structures for the governance of water which flows across borders is seldom put in place within a domestic legal and institutional setting.²⁶ The implementation of international commitments and compliance through domestic instruments, such as statutes, administrative or judicial control constitutes an important, but often neglected, part of international and national law interface.²⁷ States may advance the relationship between international law and national law by directly incorporating international law, treaties or customary law into their national systems; or through the enactment of implementing

²¹ Korhonen, I.M., ‘*Riverine Ecosystems in International Law*’, 36 Nat. Resources J., (1996) at 482.

²² Id.

²³ McCafrey, ‘*International Organizations and the Holistic Approach to Water Problems*’, 31 Nat. Resources J., (1991) at 164.

²⁴ See Fisher, D. ‘The Law and Governance of Water Resources: The Challenge of Sustainability’, Edward Edgar, UK, (2009) at 354-356.

²⁵ UN Development Program (Human Development Report), ‘*Beyond Scarcity: Power, Poverty, and the Global Water Crises*’ (2006) at 203. Available at <http://hdr.undp.org/en/media/HDR06-complete.pdf>, accessed 29 October 2012.

²⁶ Id.

²⁷ Redgwell, C. et al, National Implementation, in Bodansky, (eds.), *The Oxford Handbook of International Environmental Law*, Oxford University Press, (2007) at 923.

legislation. Those States which have entered into valid international agreements are required to fulfil their international obligations, which are duly undertaken within a national legal context.²⁸ In fulfilling such obligations, States may, however, be bound to make the necessary modifications to their national legislations and institutions in order to adjust their international commitments.²⁹ Such adjustments may require a more complex multi-level governance arrangement involving different actors mandated in carrying out various legal and institutional activities, including judicial reviews, the right of standing and public participation.³⁰

1.2 The Research Question

A combined study of national law and international law within the context of an international watercourse agreement offers the entry point for this thesis. While such analysis is crucial in tackling issues of national implementation of international obligations, examples are few and far between. For the purpose of this study, ‘national implementation’ of international commitments can be summarized as ‘measures parties take to make international agreements operative in their domestic law.’³¹ Such measures include laws, regulations, and policies states maintain under domestic jurisdictions or adopt under international commitments³² and institutional structures to enforce them.

Therefore, despite other factors, such as politics, finance, and technology, which may also impact on implementation of international agreements; it is the national laws and institutions

²⁸ Advisory Opinions, PCIJ, Exchange of Greek and Turkish Populations, (Lausanne Convention VI, January 30th, 1923, Article 2), Collection of Advisory Opinions, Publications of the PCIJ, Series B, No. 10, February 21st, 1925, at 20-21.

²⁹ Id.

³⁰ Verschuuren, J., ‘*The Case of Transboundary Wetlands under the Ramsar Convention: Keep the Lawyers Out!*’ 19 Colo. J. Int’l Env’t L. & Poly, (2008) at 52.

³¹ Redgwell, supra note 27 at 925.

³² Manual on Compliance and Enforcement of Multilateral Environmental Agreements, United Nations Environment Program, available at http://www.unep.org/dec/docs/unep_manual.pdf, accessed 12 Jan. 2011.

which play a crucial role for the implementation of any international treaty.³³ Primarily, the thesis raises the primary research question:

“How, and to what extent, do national laws and institutions support or hinder the implementation of and compliance with international obligations?”.

The thesis will adopt an applied, case study approach to examining the research question. By focussing on the potential implementation of the CFA substantive and procedural obligations within Ethiopia and Uganda; which is contingent upon national laws and institutions, and which also provide a set of constitutional and statutory arrangements that include fundamental rights and obligations relating to natural resources, environment and water resources.³⁴ While the principles under international law themselves are flexible enough to be accommodated within the national context, the national legal arrangement itself can equally provide a framework of values, principles, goals and objectives that support international-national law integration in order to achieve effective implementation.³⁵ Although this thesis seeks to answer the above research questions through combined analysis of international commitments under the CFA and Ethiopian and Ugandan national laws and institutions, as stated above, the ultimate aim is to offer a more generic insight that can be applied to other countries, basins or international treaties outside the Nile Basin. One of the reasons for this is that the need for a combined study of international and national water law cannot be restricted to a single international river basin; and other river basin agreements in the implementation of international commitments.

The thesis can also generate further research in this area of study with a view to strengthening the implementation of commitment under international watercourse agreements.

³³ Redgwell, *supra* note 27 at 923.

³⁴ *Id.*, at 4.

³⁵ *Id.*

1.3 Methodology of the thesis

The legal research methodology adopted in this thesis is mainly based on the analysis of the linkages between international and national law. It employs international-national laws and institutions in support of the implementation of international commitments, by identifying principles, goals and objectives, or identifying areas of harmonisation which can advance national implementation. The focus is the analysis of examination of national laws, policies for discharging responsibilities under international laws. The methodology is to serve the main objective i.e. to offer more generic insight from the Nile experience, which can be used as a framework for application to basins outside the Nile in the national implementation of international watercourse treaties.

In order to analyse the interface between international and national law within the framework of a trans-boundary watercourse treaty, this research will firstly examine the content of selected core substantive and procedural rules of international water law under CFA. These rules include the principles of equitable and reasonable utilization, the principle of obligation of no-significant harm, the protection of ecosystems, the principles of information and data exchange, and the principle of prior notification on planned measures. Although a number of other international legal principles have been incorporated under the CFA, the thesis is restricted to normative principles, most of which can be attributed to long-standing legally established state practice and considered to have acquired the status of customary international law. The majority of principles in the CFA are drawn from the 1997 UN Convention on the Law of Non-Navigational Uses of International Watercourses (UNWC), and therefore impose international legal obligations as customary international law upon states which have adopted them. The development and practice with regard to the principle of

equitable utilization within the judicial decisions of the United States in Supreme Court in interstate water disputes can be considered as confirmation of national links.³⁶

However, the main criterion for the selection of substantive and procedural elements is not only that they are rules and principles of international law, but also that they must be implemented at a national level in coordination with the national laws of riparian countries. The elements have wider relevance to national application; for instance the implementation of the principles of equitable and reasonable utilisation and that of no-significant harm requires operative criteria. However, the implementation of the criteria is highly dependent on integrated national data and information exchange, including hydrological, socio-economic, demographic, and other factors described under the UNWC and the CFA.³⁷ The process for gathering, analysing and exchanging national data and information operates within the national jurisdictions of riparian countries through domestic laws and institutional structures. The links between international law and national laws and institutions are as much of value as the trans-boundary resources.³⁸ Laws, policies and institutions pertaining to the principle of prior notification on planned measures, Environmental Impact Assessment (EIA) and dispute settlement mechanisms provide critical support in the process of implementation of procedural principles.

Among other elements selected for analysis is the concept of ‘public participation’, which has a limited status water law principle, and yet is essential for the implementation of international commitments within the national borders and beyond. ‘Water security’ has also emerged as a new global concept, where its interactions with traditional ‘national security’ have raised critical questions of implementation of watercourse agreement within the CFA.

³⁶ For more details, see Sherk, G.W., ‘Dividing the Waters: The Resolution of Interstate Water Conflicts in the United States’, Kluwer Law International, London, (2000).

³⁷ Convention on the Law of Non-Navigational Uses of International Watercourses-New York, 21 May 1997, reprinted in 36 I.L.M. 700, (1997); Article 5 and 6. See also CFA, Article 4.

³⁸ LeMarquand, D.G., ‘*Precondition to Cooperation in Canada-United States Boundary Waters*’, 26 Nat. Resources J., (1986) at 221.

Another new concept in the development and implementation of international watercourse agreements is the concept of ‘benefit sharing’, which has been analysed within the prism of the principle of equitable and reasonable utilization. Although the concept is mainly an economic concept, with some additional environmental and political dimensions,³⁹ a strong argument can be made on its alignment with the core legal principles, such as equitable utilization and no-significant harm, whose implementation also require strong national interface.⁴⁰

The methodology based on the choice of the above elements is to offer proper insight in to the relationship between international and national law, while taking into account the limitations in scope and capacity regarding the research focus on the most pertinent principles. Accordingly, in examining national laws and institutions of Ethiopia and Ugandan an integrative and comparative methodology is used in order to bring out the interface between international and national laws. The analysis of the national case studies examines national constitutions, water legislation and policies, and institutional structures supporting the implementation of international commitments at national level and identifies gaps. While the analysis of the national laws aims to address purely legal questions, national policies will also be discussed within the context of their pertinent principles influencing and serving as the source of such national laws and institutional mandates. No particular jurisdictional priority was set for selecting Ethiopia and Uganda as case studies. The overarching criterion was the strength of the two domestic laws, their policies and institutional structures in the implementation of international law commitments. Examination of their national laws and policies among a number of the Nile Basin countries indicates narrower gaps and the

³⁹ See H. Qaddumi ‘*Practical Approach to Transboundary Water Benefits Sharing*’ (Working Paper 292 ODI July 2008).

⁴⁰ See for detail about ‘benefit-sharing’, Abseno, M., ‘*The concept of equitable utilization, no-significant harm and benefit-sharing under the Nile River Basin Cooperative framework agreement: Some highlights on theory and practice*’. The Journal of Water Law, (2010)

capacity to facilitate the implementation of international commitments. Both countries have put water resources management policies, laws and regulations in place as well as structures which can be worthy of analysis for a framework of the relation between international and national laws and for proper implementation of international commitments. Examinations of the two legal systems show that basic principles supporting the core elements selected for analysis have been incorporated in both national constitutions. Specific provisions with regard to the administration of transboundary water resources and provisions pertaining to cooperation on peaceful means of dispute resolution could be cited as some of the examples. Moreover, the two case study countries have put in water resources management policies that incorporate a number of fundamental policy principles on transboundary water resources in general and specific guidelines supporting substantive and procedural principles in particular. The role of the State in the administration of natural resources in both case studies, in particular, specific laws and regulations pertaining to water resources, its functions in overseeing the use, protection, conservation and the management of water resources in accordance with permit system all offer ample opportunity for the examination of their impacts on transboundary water resources, and thereby seek the extent of the support or gaps in the relationships between international and national water laws. This thesis uses a combination of primary and secondary materials in its analysis. Among the primary materials are: the Nile River Basin Cooperative Framework Agreement, Ethiopian and Ugandan constitutions, proclamations, regulations, acts and policies. Official documents and books relevant to the subject are also used as secondary resources.

1.4 The structure of the thesis

Chapter 1 of the thesis emphasizes the need for a combined study of international and national water laws. The need for proper implementation of international rules governing

trans-boundary water resources at national level requires investigating the issue from international-national (water) law perspectives. Doctrinal debates over the relationship of the two legal systems are also discussed under Chapter 1 in order to demonstrate the inadequacy of existing theories and the need to build up the study of international and national laws as having impact on each other. It is stressed within this chapter that modern development of international and national laws necessitates an integrative approach, where States are required to commit themselves to both international and domestic laws.

Chapter 2 begins by discussing the background, scope and current status of basic substantive and procedural principles and rules governing shared Nile water resources under the CFA. It examines the analytical framework through the substantive and procedural principles and institutional structures for the combined study of international and national (water) laws.

Chapter 3 examines the domestic synthesis on substantive rules and principles within the Ethiopian and Ugandan legal systems. Accordingly, this chapter assesses Ethiopian and Ugandan laws, policies and institutions in order to determine the impact of existing legal systems in the implementation of basic principles of international water law within the ambit of the CFA. Moreover, by examining relevant constitutional provisions, policies and various national water legislations, this chapter will investigate whether CFA principles are supported under the Ethiopian and Ugandan legal arrangements, and to what extent they help or hinder the implementation of the principles. The core substantive principle examined in this chapter forms the most important part of analytical framework in the study for assessing the linkages between national and international law.

Chapter 4 considers the general obligation of States to cooperate on data and information exchange as well as notice of planned measures and consultation, as an essential procedural requirement for the implementation of the principle of equitable utilization. The principles of data and information exchange and prior notification on planned measures, which constitute

basic procedural rules of international water law, are discussed in this chapter. The chapter also examines the content of these principles within the context of the CFA and the extent of their relationships with the national laws. In addition, it considers how a strong relationship can be forged between international and national law in the implementation of data and information exchanges. This chapter will also investigate Environmental Impact Assessment (EIA) and audits and the role of national legislations in undertaking EIA and audits in order to ascertain the extent of interface with international commitments.

Chapter 5 encompasses the institutional structures of the CFA vis-à-vis existing structures in Ethiopia and Uganda, in order to create the necessary links essential for the implementation of international commitments. Different regional experiences discussed in this chapter will highlight the need for coordination and interface between regional, sub-basin and national structures in Ethiopia and Uganda.

Chapter 6 of the research discusses the findings of the analytical framework and the methodology employed to answer the research question: “How, and to what extent, national laws and institutions support or hinder the implementation of and compliance with international obligations?”. Based on the combined study of international and national laws investigated, the chapter encapsulates highlights the relevance of national framework to the Nile and elsewhere to other river basins, or international and national laws.

Chapter 7 summarizes the entire thesis with the aim of delivering the answers provided to the research questions raised and how the analysis attempted to address them.

CHAPTER 2

THE NORMATIVE CONTENT OF THE NILE RIVER BASIN COOPERATIVE FRAMEWORK AGREEMENT (CFA)

2.1 Introduction

The purpose of this chapter is to analyse substantive and procedural principles under the Nile River Basin Cooperative Framework Agreement (CFA). The intention is, to determine what relevant legal arrangements in support their implementation can be in place at the national level. This is achieved through examination of the national case studies in subsequent chapters. This chapter begins by looking in to the substantive and procedural principles as well as the institutional aspects of the CFA. The analysis of pertinent provisions seeks to highlight the legal rights and obligations contained in the CFA and the interpretation of their meaning.

The analysis is based on core elements, which were selected on the basis of their relevance with regard to their implementation at the national level. The core elements include, substantive and procedural principles of equitable and reasonable utilization and no-significant harm; information and data exchange; planned measures; environmental impact assessment; public participation; dispute settlement; and institutional aspects.

The analysis is to identify a combined framework supported by the national laws and institutions, which can be suggested to foster the international-national water law interface conducive for the implementation of the CFA. With regard to the analysis of international law, the basic principles of equitable utilization and no-significant harm are considered core

principles which have attained the status of customary international law.⁴¹ Procedural principle of duty to exchange regular data and information and the principle of prior notification of planned measures retain an increasing impact on the development of international and national water laws. Other principles selected for analysis in this chapter are principles widely incorporated into modern international treaties. Therefore, the selection of core elements forms an important part of the research in establishing the relationship between the principles of international law and the national laws.

2.2 The CFA

2.2.1 Evolution and current status

The negotiation process for a comprehensive legal and institutional framework in the Nile Basin was started in 1996.⁴² Following a decade long tough negotiations, an agreement was reached on many of the substantive and procedural rules. In May 2010, the Nile Council of Ministers (Nile-COM) decided to open the CFA for signature and ratification by those States in whose territories the Nile River Basin is situated. Six of the countries, Burundi, Ethiopia, Kenya, Rwanda, Tanzania and Uganda signed the agreement, while Egypt and Sudan refused to sign, unless the right to existing uses is recognised under the controversial Article on ‘water security’.⁴³ The Ministers of the rest of the riparian countries agreed to annex the controversial article for future consideration by an international audit Committee, under the auspices of the NRBC.⁴⁴

⁴¹McCaffrey, S. C., ‘The Law of International Watercourses: Non-Navigational Uses’, Oxford University Press, (2003).

⁴²Final Report, Nile River Basin Cooperative Framework Project, 3, Rpt.1.7-March 2000, (The Ministry of Water Resources and Energy- Ethiopia).

⁴³ Extra-Ordinary Nile Council of Ministers’ Meeting, May 22, 2009, Kinshasa, Democratic Republic of Congo, Minutes. (Boundary and Transboundary Rivers Affairs Directorate, Ministry of Water Resources and Energy, Ethiopia).

⁴⁴Id.

The CFA has six parts incorporating general principles; rights and obligations; institutional structures; subsidiary institutions; miscellaneous provisions regarding settlement of disputes; and final clauses.⁴⁵

2.2.2 The scope of the CFA

Article 1 of the CFA provides:

‘The present Framework applies to the use, development, protection, conservation and management of the Nile River Basin and its resources and establishes an institutional mechanism for cooperation among the Nile Basin States.’⁴⁶

The scope of the CFA creates a general legal relationship between the Nile Basin States with regard to uses, development and the socio-economic aspect of its application. The Framework also applies to the protection and conservation of the environmental and ecosystem. The application of the CFA then, extends to the institutional mechanism for the management of the Nile River Basin and its resources. The combined approach to the definition of scope offers the Nile Basin States a comprehensive legal and institutional framework to promote, ‘integrated management, sustainable development, and harmonious utilization of the water resources of the Basin, as well as their conservation and protection for the benefit of the present and future generations.’⁴⁷

With regard to the geographical and hydrological definition of the use of terms, Article 2 of the CFA provides:

For the purposes of the present Cooperative Framework Agreement:

(a) ‘Nile River Basin’ means the geographical area determined by the watershed limits of the Nile River system of waters; this term is used where there is reference to environmental protection, conservation or development.’

⁴⁵ Agreement on the Nile River Basin Cooperative Framework (CFA) opened for signature on 14 May 2010; See the Preamble. (Copy with the author).

⁴⁶ Id., article 1..

⁴⁷ Id.

(b) ‘Nile River system’ means the Nile River and the surface waters and ground waters which are related to the Nile River; this term is used where there is reference to utilization of water.’⁴⁸

The question of determination of hydrologic and geographic scope of application of the rules of the CFA with regard to the use of terms had been sensitive, both during the CFA negotiations. That had also been the case during the work of the International Law Commission (ILC) on the 1997 Watercourses Convention (UNWC). However, it had been recognized that both concepts; ‘river basin’ and ‘river system’ require national laws operating in tandem in order to determine the hydrologic and geographic scope of the application.

The CFA is the only viable legal framework that provides compromises and convergence of different interests of the Nile Basin States. Examined with the context of the history Nile conflict discourse, it offers an acceptable formula with regard to the scope of application for the management of Nile waters. Therefore, the application of ‘terms’ under the CFA can serve not only as an architecture to future joint management, but also as a constitutive foundation to national implementation through appropriate national laws and institutions. However, the range of applicability of scope as is based on substantive and procedural norms that could be elaborated through subsequent protocols, amendments and annexes; and which also takes in to account national laws and institutions of the Nile Basin countries.

2.3 The Principle of Equitable and Reasonable Utilization under the CFA

Article 4 (1) of CFA provides:

‘Nile Basin States shall in their respective territories utilize the water resources of the Nile River Basin in an equitable and reasonable manner. In particular, those water

⁴⁸ Id., Article 2(a-b).

resources shall be used and developed by Nile Basin States with a view to attaining optimal and sustainable utilization thereof and benefits therefrom, taking into account the interests of the Basin States concerned, consistent with adequate protection of those water resources. Each Basin State is entitled to an equitable and reasonable share in the beneficial uses of the water resources of the Nile River Basin.⁴⁹

Article 4 (1) reflects the right to entitlement of the Nile Basin States to the utilization of the portion of the Nile River within their territory.⁵⁰ Such entitlement entails both the right to utilize the water resources within their national territory in an equitable and reasonable manner, and the obligation not to exceed such right, or deprive other watercourse States of the same right.⁵¹

Article 4 also recognizes the importance of water allocation, where, '[e]ach Basin State is entitled to an equitable and reasonable share in the beneficial uses of the water resources of the Nile River Basin.'⁵² The phrase 'entitlement of each state to an equitable and reasonable share' is interpreted by the upper riparian States as a form of redress to historical imbalances of the existing volumetric water sharing arrangement between two downstream States in the Nile; namely, Egypt and Sudan.⁵³ The notion of 'water sharing' is, thus perceived as physical 'water division'. However, such parlance cannot be attributed to contextual meaning of modern international water law, including the CFA. The meaning of term 'water sharing' as defined by the U.S. Supreme Court in its decision concerning *Kansas v. Colorado* case affirmed that:

'[e]quality of rights' does not mean 'that there must be an equal division of the waters of an interstate stream among the States through which it flows. It means that the principle

⁴⁹ Id., Article 4 (1).

⁵⁰ Commentary to Draft Articles on the Law of the Non-navigational Uses of International Law Commission on the work of its forty-sixth session, UN GAOR, 49th Sess., Supp. (no. 10). U.N. Doc. A/49/10 (1994), reprinted in (1994) 2(2) Y.B. Int'l L. Comm'n, at 97.

⁵¹ Id.

⁵² Article 4 (1), CFA *supra* note 45.

⁵³ See Cascão, A., 'Use of Ambiguity in Transboundary River Basins Negotiations: The Case of the Nile River Basin', paper presented at the Nile Basin Development Forum, November 2008, Khartoum, Sudan.

of rights and equity shall be applied having regard to the equal level or plane on which all States stand in point of power and right under our constitutional system and that upon consideration of the pertinent laws of the contending States and all other relevant factors.⁵⁴

The purpose of right to water sharing is, therefore, to attain optimal and sustainable utilization,⁵⁵ rather than physical share, which lacks practical application. The impracticality can also be observed from the deliberate circumvention of the concept of ‘water sharing’ from the work of the ILC and the introduction of term ‘optimal use’.⁵⁶ Therefore, it is not equal share, but equitable and reasonable share, which offers the true meaning of utmost benefit to each Basin state from the use of the waters, and the lowest injury to others.⁵⁷ In order to achieve this objective Article 4 (2) of the CFA provides a non-exhaustive list of relevant factors and circumstances for consideration.⁵⁸ Therefore,

In ensuring that their utilization of Nile River System water resources is equitable and reasonable, Nile Basin States shall take into account all relevant factors and circumstances, including but not limited to the following:

- (a) Geographic, hydro-graphic, hydrological, climatic, ecological and other factors of a natural character;
- (b) The social and economic needs of the Basin States concerned;
- (c) The population dependent on the water resources in each Basin State;

⁵⁴ *Kansas v. Colorado* 206 U.S. 46 (1907). The Court considered Kansas water law (riparian) and Colorado water law (prior appropriation) and concluded that, when state laws and policies were in conflict, equity would control and the interests of the two states would be balanced. See also Sherk W.S., ‘Equitable Apportionment after Vermejo: the Demise of a Doctrine’, 29 Nat. Resources J., (1989) at 567 and 569.

⁵⁵ See Article 5 (1), UN Watercourses Convention, *supra* note 37. See also Tanzi, A., & Arcari, M., ‘The United Nations Convention on the Law of international Watercourses’: Kluwer Law International, London, (2001) at 105.

⁵⁶ According to the ILC Commentary, the word ‘equitable’ refers to ‘the attainment of optimal utilization and benefits’. The Commentary further elaborates ‘the attainment of maximum possible benefits for all watercourse States and achieving the greatest possible satisfaction of all their needs, while minimizing the detriment to, or unmet needs of each. See ILC Commentary, *supra* note 50.

⁵⁷ Article IV of the 1966 Helsinki Rules states: ‘Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin.’ See Helsinki Rules on the Use of Waters of International Rivers, adopted by the I.L.A. at the 52nd Conference, Helsinki, Finland, August 1966, reprinted in Bogdanović, S., *International Law of water Resources: Contribution of the International Law Association (1954-200)*, 89 (Kluwer Law International, The Hague, 2001).

⁵⁸ See CFA; *supra* note 45, Article 4(2-6).

- (d) The effects of the use or uses of the water resources in one Basin State on other Basin States;
- (e) Existing and potential uses of the water resources;
- (f) Conservation, protection, development and economy of use of the water resources and the costs of measures taken to that effect;
- (g) The availability of alternatives, of comparable value, to a particular planned or existing use;
- (h) The contribution of each Basin State to the waters of the Nile River system;
- (i) The extent and proportion of the drainage area in the territory of each Basin State.

The application of the above relevant factors and circumstances necessitates consultations in a spirit of cooperation among the Nile Basin States concerned.⁵⁹ According to the CFA, ‘the technical application of the weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors. In determining what is a reasonable and equitable use, all relevant factors are to be considered together and a conclusion reached on the basis of the whole,’⁶⁰ with the exception of vital human needs, which enjoys inherent priority in reconciling competing uses.⁶¹

The protection of vital human needs has national significance in the context of economically less developed States in the Nile basin; where water and food security are intrinsically connected for the survival of their populations. Countries such as Ethiopia have clearly stipulated the requirement of basic human needs in their constitutions in relation to the right to access to clean water and sanitation. The law states: ‘[t]o the extent the country’s resources permit, policies shall aim to provide all Ethiopians access to public health, clean water, housing, food and social security.’⁶² International water law sets the meaning of vital human

⁵⁹ Id, Article 4 (3).

⁶⁰ Id., Article 4 (4).

⁶¹ Rieu-Clarke, A., ‘International Law and Sustainable Development’, IWA Publishing, London, (2005) at 110-132.

⁶² See Constitution of the Federal Republic of Ethiopia, (1995), Federal Negarit Gazeta, Proclamation No. 1/1995, Article 50.

needs as the provision of ‘sufficient water to sustain human life, including both drinking water and water required for the production of food in order to prevent starvation.’⁶³

The CFA also lays down a provision highlighting the importance of national laws in the implementation of equitable and reasonable utilization. According to Article 4 (5 and 6):

‘Nile Basin States shall, in their respective territories, according to their national laws and regulations, keep the status of their water utilization under review in light of substantial changes in relevant factors and circumstances.’⁶⁴

‘Nile Basin States shall observe the rules and procedures established by the Nile River Basin Commission for the effective implementation of equitable and reasonable utilization.’⁶⁵

The CFA requirement of the application of national laws and regulations in keeping the status of water utilization demonstrates the critical role the national laws and institutions shall play in the implementation of the principle of equitable and reasonable utilization.⁶⁶

Consultation is essential to ‘reduce unilateralism in the assessment of the equitable utilization of an international watercourse, without diminishing the importance of an individual action in the implementation thereof.’⁶⁷ Consultation and cooperation is deemed the necessary factor in the determination of equitable and reasonable utilization under the CFA.⁶⁸ Accordingly,

⁶³ ILC Commentary *supra* note 50, para. 4 at 110. For further details on the issue see Rieu-Clarke, *supra* note 66. See also Gleick, P.H., ‘Basic Water Requirements for Human Activities: Meeting basic Needs’, 21 *Water Int’l* (1996) at 83.

⁶⁴ CFA *supra* note 45, Article 4 (5).

⁶⁵ *Id.*, Article 4 (6).

⁶⁶ *Id.*, Article 4 (5).

⁶⁷ Tanzi & Arcari, *supra* note 55 at 123. According to some writers negotiation does not impose obligation. ‘Nevertheless, it remains questionable whether or not the obligation of agreement is included in the obligation of negotiation, i.e., the interested states would be bound to arrive at a successful consultation, by means of concluding some sort of agreement.’ See Bruhàcs, ‘The Law of Non-Navigational Uses of International Watercourses’, Martinus Nijhoff Publishers, (1993) at 178.

⁶⁸ Bourne, C., ‘Procedure in the Development of International Drainage Basins: The Duty to Consult and to Negotiate’, 10 *Can. Y.B. Int’l L.*, (1972) at 212.

‘In the application of paragraphs 1 and 2 above, the Nile Basin States concerned shall, when the need arises, enter into consultations in a spirit of cooperation.’⁶⁹

According to CFA, the spirit of cooperation between States forms ‘the basis of sovereign equality, territorial integrity, mutual benefits and good faith in order to attain optimal utilization and adequate protection and conservation of the Nile River Basin and to promote joint efforts to achieve social and economic development.’⁷⁰

2.4 Water security

Associated with the principle of equitable and reasonable utilization are also the concepts of ‘water security’ and ‘benefit-sharing’. This research will not dwell much on the analysis of the two concepts. However, the controversy over the concept of ‘water security’ in the Nile can be examined within the context of the CFA rules and supporting domestic laws and institutions for their implementation. As a new principle, to what extent can it impact the implementation of the CFA is a question which requires addressing the issue within the prism of the core principles of equitable and reasonable utilization and no-significant harm. Its applicability may also be read with the CFA’s principle concerning the rights of States to the use of water within their respective territories.⁷¹

Existing literature portray the concept of ‘security’ as a contested concept with no agreed definition.⁷² The meaning ‘water security’ is not clear as there is no universally accepted definition.⁷³ The conventional meaning encompassing other spheres, such as ‘environmental

⁶⁹CFA, *supra* 45, Article 4 (3).

⁷⁰ *Id.*, Article 3 (1).

⁷¹ *Id.*, Article 3, paragraph 6.

⁷² Barry Buzan, *People, States and Fear: an Agenda for International Security Studies in the Post-Cold War Era*, second ed., Boulder Co, Lynne Rienner, 1991 at 16.

⁷³ See Wouters, P.K., et al, *Water Security; What Role for International Water Law*, in Dodds & Pippard (ed.), *Human & Environmental Security: An Agenda for Change*, Earthscan, London (2005). For details, see Wouters, P.K., ‘Water Security, Hydrosolidarity, and International Law: A River Runs Through It ...’ 19 *Y B Int’l Environmental L.*, Oxford University Press, (2010) at 97-134. See also Wouters, P.K., ‘Water Security: Global, regional and local challenges’, Institute for Public Policy Research, (2010) at 7. Available at

security’; ‘energy security’; ‘food security’; and ‘water security’ ‘makes the meaning more complex.’⁷⁴ Moreover, the emerging concept of ‘water security’ needs to be dissociated from, from traditional concept of security threats, which are qualitatively different notions.⁷⁵

Article 2 (f) of the CFA defines ‘water security’ as: ‘the right of all Nile Basin States to reliable access to and use of the Nile River system for health, agriculture, livelihoods, production and environment.’⁷⁶ This general definition is supplemented by a more specific provision, which reads:

‘Having due regard for the provisions of Articles 4 and 5, Nile Basin States recognize the vital importance of water security to each of them. The States also recognize that cooperative management and development of the waters of the Nile River System will facilitate achievement of water security and other benefits. Nile Basin states therefore, agree, in a spirit of cooperation:

- a) to work together to ensure that all States achieve and sustain water security;
- b) the unresolved Article 14(b) is annexed to be resolved by the Nile River Basin Commission within six months of its establishment.⁷⁷

It is not easy to ascertain the basis of the above definition as being derived from international water law experience; as the issue of ‘water security’ was not addressed by the 1966 Helsinki Rules or by the 1997 UN Watercourses Convention. Therefore, it can be assumed that the introduction of the concept to the Nile did not emanate from international experience. The only probable explanation for its introduction can, therefore, be assumed as an alternative to

<http://www.ippr.org/publications/55/1772/water-security-global-regional-and-local-challenges>, accessed on 16 August 2010.

⁷⁴Terry Terrify et al, *Security studies today*, Polity press, 2003, at 2, 115.

⁷⁵Dyer, H., *Environmental Security: The New Agenda*, in Jones and Kennedy-Pipe (eds.), *International Security in a Global Age: Securing the Twenty-first Century*, Frank Cass, Publishers, London, (2000) at 138.

⁷⁶CFA, supra note 45, Article 2(f).

⁷⁷At the end of the negotiations, no consensus was reached on Article 14(b) which reads as follows: not to significantly affect the water security of any other Nile Basin State, all other countries agreed to this proposal except Egypt and Sudan. Egypt proposed that Article 14(b) should be replaced by the following wording: (b) not to adversely affect the water security and current uses and rights of any other Nile Basin State. The Extraordinary Meeting of the Nile Council of Ministers, held in Kinshasa, the Democratic Republic of Congo, on 22 May 2009 resolved that the issue on the Article 14(b) annexed resolved by the Nile River Basin Commission within six months of its establishment. See CFA, supra note 45, Annex 14(b).

the controversial issue of ‘existing agreements’⁷⁸, in order to break the stalemate over the progress and finalization of the CFA by the Nile Basin States.⁷⁹

The CFA definition of the term ‘water security’ which fails to provide a conclusive and consensual understanding among upstream and downstream countries may impact the implementation of the CFA.

2.5 Benefit-sharing

‘Benefit-sharing’ is a concept based on an economic and environmental policy driven approach. One of the most important elements of ‘benefit-sharing’ is the notion of joint effort by States for balancing economic benefits in the exploitation of their natural resources and the preservation of the environment. International instruments supporting this notion include, the 1972 United Nations Stockholm Conference on Human Environment, which called ‘upon Governments and peoples to exert common efforts for the preservation and improvement of the human environment, for the benefit of all the people and for their posterity.’⁸⁰ The Conference in Mar del Plata, which helped the global policy focus on the issue of water.⁸¹ The 1992 United Nations Conference on Environment and Development in Rio de Janeiro, which also called States to ‘cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation.’⁸²

⁷⁸Article 14 on Existing Agreements read:

‘Existing agreements which are inconsistent with the Framework shall be null and void to the extent of their inconsistency.’ Note: ‘Egypt and Sudan entered a reservation to this provision and proposed the following alternative provision: “The Cooperative Framework shall be without prejudice to existing agreements.” CFA Draft Text, 2003. (Copy with the author).

⁷⁹Meeting Minutes - Extraordinary Meeting of the Nile COM Ministers, 30-31 March 2006, Addis Ababa, Ethiopia. (Courtesy of Boundary and Transboundary Rivers Affairs Directorate, Ministry of Water Resources, Ethiopia).

⁸⁰ See Declaration of the UN Conference on the Human Environment, June 16, 1972, UN Doc. A/Conf.48/14/Rev.1 (1972), reprinted in 11 I.L.M. (1972).

⁸¹ See also See Report of the United Nations Water Conference, Mar del Plata, 14-25 March 1977, available at www.internationalwaterlaw.org/.../UN/Mar_del_Plata_Report.pdf, accessed on 22 March 2010.

⁸² Declaration of the UN Conference on Environment and Development, Rio de Janeiro, Brazil, Jun. 13, 1992, in Report of the United Nations Conference on Environment and Development, Annex I, U.N. Doc.

The concept of benefit-sharing can also be used to advance the national agenda relating to equitable and reasonable utilization of transboundary water resources. According to Sadoff and Grey, there are four types of benefit-sharing. The first type of benefit refers to cooperation on the preservation and protection of the ecosystems and environment providing *benefits to the river*.⁸³ *Benefits from the river* include the indirect economic and social benefits that might be achieved through cooperation on integrated transboundary resource management, in form of hydropower development, flood management and integrated watershed management.⁸⁴ The other is *political benefit*, which may be achieved as a result of the above cooperation and manifested through normalization of relations and mitigation or reduction of regional political tensions as gains in indirect human and material costs.⁸⁵ The fourth type of benefits is *benefits beyond the river*, which is an aggregate of the greater cooperative benefits transcending water and bringing regional economic and political integration, enhancing regional peace and security.⁸⁶

The relatively new concept of ‘benefit-sharing’ has attracted attention of the Nile Basin countries, with the introduction of the NBI- Socio-economic Development and Benefit Sharing Project (SDBS), which had the aim ‘to enhance the process of integration and cooperation to further socio-economic development in the Nile Basin.’⁸⁷ Sub-basin joint development projects identified through Cooperative Regional Assessment (CRA) for the

A/Conf.151/26 (Vol. 1), *reprinted* in 31 I.L.M. 876 (1992). See also Agenda 21: A Programme for Action for Sustainable Development, Rio de Janeiro, Brazil, Jun. 13, 1992, in Report of the United Nations Conference on Environment and Development, Annex II, U.N. Doc. A/Conf.151/26 (Vol. II) (1992).

⁸³ C. Sadoff & Grey, D., ‘Cooperation on International Rivers: A Continuum for Securing and Sharing-Benefits’, 30 *Water International* at 2.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ According to the NBI project profile, ‘the SDBS was aimed at building a network of professionals from economic planning and research institutions, technical experts from the public and private sectors, academics, sociologists, and representatives from civic groups and NGOs from across the basin to explore alternative Nile development scenarios and benefit-sharing schemes. The regional project management unit was co-located with the Nile Basin Initiative Secretariat in Entebbe, Uganda.’ available at the Nile Basin Initiative, http://www.nilebasin.org/newsite/index.php?option=com_content&view=article&id=59&Itemid=90&lang=en, accessed on 21 October 2010.

Eastern Nile can be cited as another example for a fair share of benefits.⁸⁸ Joint Multipurpose Program (JMP)⁸⁹ in the Eastern Nile also envisages the idea of benefit sharing ‘through joint institutions and infrastructure at national level.’⁹⁰

From a legal perspective, it may be argued that the concept of benefit-sharing cannot be interpreted as a mere economic concept or an alternative to the principle of equitable utilization.⁹¹ Benefit sharing is not a disconnected notion from the principle of equitable and reasonable utilization; and the distinction between the two is more of artificial than real.⁹² National laws supporting the concept of equitable and reasonable utilization can also be used in order to determine its affiliation to domestic implementation.

Finally, the implementation of equitable and reasonable utilization cannot be realized without the principle of obligation not to cause significant harm to another state.

2.6 The Principle of No-significant Harm under the CFA and its Relationship to Equitable and Reasonable Utilization

Article 5 (1) of the CFA provides:

‘Nile Basin States shall, in utilizing Nile River Basin water resources in their territories, take all appropriate measures to prevent the causing of significant harm to other Basin States’.⁹³

Article 5 (2) requires:

⁸⁸ See Joint Multi-purpose Program, available at http://nilebasin.org/newentro/index.php?option=com_content&view=article&id=83%3Ajoint-multipurpose-program&catid=65%3Amulti-purpose-projects&Itemid=111&lang=en, accessed at 21 October 2012.

⁸⁹ See Terms of Reference for Strategic Social and Environmental Assessment (SSEA), Easter Nile Subsidiary Action Program (ENSAP); Easter Nile Joint Multipurpose Program (JMP), available at <http://ensap.nilebasin.org/>, accessed 24 August 2010. See also The Nile Equatorial Lakes Subsidiary Action Program (NELSAP), available at http://www.nilebasin.org/index.php?option=com_content&task=view&id=75&Itemid=115, accessed on 24 August 2010.

⁹⁰ Id.

⁹¹ See Qaddumi, H., ‘Practical approach to transboundary water benefits sharing’, Working Paper 292 ODI, July 2008. Available at <http://www.odi.org.uk/resources/download/1929.pdf>, accessed 15 August 2010.

⁹² Tarlock, D. & Wouters, P.K., ‘Are Shared Benefits of International Waters an Equitable Apportionment’, 18 *Colo J Int’l L & Pol’y*, (2007) at 526-527.

⁹³ CFA supra note 45, Article 5(1).

‘Where significant harm nevertheless is caused to another Nile Basin State, the State, whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures, having due regard to the provisions of Article 4 above, in consultation with the affected State, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.’⁹⁴

The interpretation of no-significant harm under the CFA conforms to the interpretation of the 1997 UNWC, which does not exclude harm from being caused.⁹⁵ Harm under international water law is unavoidable; and in this case, it does make the principle of no-significant harm an obligation of conduct than that of result.⁹⁶ In the Nile context, ‘any Nile Basin State causing significant harm to another Nile Basin State [must] take all appropriate measures through consultation with the affected State, with the aim to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.’⁹⁷ It shall further be noted that such measures must be supported by enabling national laws, regulations and institutions supporting the implementation of the required measures under the CFA.

The question of the relationship between equitable and reasonable utilization and no-significant harm is another important legal issue in the implementation of the two principles. Both principles have attained solid normative ground as principles of international water law.⁹⁸ The relationship between the two principles is associated with upstream states (equitable utilization-water quantity) and downstream States (no-significant harm-water quality).⁹⁹ However, the primacy of equitable utilization over no-significant harm rule seems

⁹⁴ Article 5, CFA, *supra* note 45.

⁹⁵ McCaffrey, S.C., ‘Assessment of the Work of the International Law Commission’, 36 *Nat. Resources J.*, (1996), at 310.

⁹⁶ See also Rieu-Clarke; *supra* note 61 at 117-118.

⁹⁷ See CFA; *supra* note 45, Article 5(2).

⁹⁸ Musa Abseno, ‘The Concepts of Equitable Utilization, No-significant Harm and Benefit-Sharing under the Nile River Basin Cooperative Framework Agreement: Some Highlights on Theory and Practice’, 20 *Water Law Journal*, (2010) at 86.

⁹⁹ Utton, A., ‘Which Rule Should Prevail in International Water Disputes: That of Reasonableness or that of No-Harm?’ 36 *Nat. Resources J.*, (1996) at 636.

to enjoy acceptance.¹⁰⁰ The prevailing understanding of harm under the UNWC can be associated with ‘environmental harm’ than economic harm. The same assumption can be held *ipso facto*, within the context CFA, although a closer examination of claims of no-significant harm reveals concerns economic harm as well.¹⁰¹ For example, Egypt’s claim on no-harm is usually associated with its entitlement to the 1955 water quota, as a foreclosed socio-economic right.¹⁰² As water demand for the economic sector, mainly, agriculture and industry increases, the development activities may generate greater interest in economic harm rather than environmental harm. However, such analysis should not be construed to mean the preclusion of ‘environmental harm’ from the equation of no-significant harm rule. On the contrary, environmental harm, including pollution and flood receive no less attention under the obligation of States not to cause significant harm. The commitments under the principle of no-significant harm require national laws supporting its implementation; in particular national environmental regulations and environmental agencies can facilitate the implementation of the principle of no-significant harm under the CFA. The relationship between equitable and reasonable utilization and no significant harm is part of obligation of states to protect and conserve the ecosystem.

¹⁰⁰ Among those in favour of this position include Bourne, C.B., ‘The Primacy of Principle of Equitable Utilization in the 1997 Watercourses Convention’: 35 Can. Y. B. Int’l L., (1997), at 221; Schwebel, S., Third Report on the Law of Non-navigational Uses of International Watercourses, [1982], 2(2) Y.B. Int’l L. Comm’n, 65, U.N. Doc. A/CN.4/SER.A/1982/Add.1, at 103.; McCaffrey, C. S., Fourth Report on the Law of the Non-navigational Uses of International Watercourses, U.N.GAOR, Int’l L. Comm’n, 40th Sess. at 14, U.N. Doc. A/CN.4/412/Add.2, (1998); Wouters,, P.K., ‘Allocation of Non-navigational Uses of International Watercourses: Efforts at Codification and the Experience of Canada and the United States’ 30 Can. Y.B.Int’l L., 47, (1992); Tanzi, A., ‘Codifying the minimum standards of the law of international watercourses: remarks on part one and a half’, 21, Nat. Resources Forum, (1997) at 109-110; See also Hayton, R.D., ‘Observations on the International Commission’s Draft Rules of the Non-navigational Uses of International Watercourses-Articles 1-4’, 3 Colo. J. Int’l Env’tl. L. & Pol’y (1992).

¹⁰¹ See Musa Abseno, ‘How does the Work of the ILC and the General Assembly on the Law of International Watercourses Contribute towards a Legal Framework for the Nile Basin?’, RLLM Thesis, University of Dundee, (2009) at 88.

¹⁰² Id., See also A Hefny, M., & Amer, S., ‘Egypt and the Nile Basin’, Aquatic Sciences, Aquat. Sci. 67 (2005) 42–50, available at <http://www.springerlink.com/content/2ed3elngyb2e352g/>, accessed 15 April 2010.

2.7 The Obligation to Protect and Conserve the Nile River Basin and its Ecosystems

‘Conflict is one part of the story. But more importantly, people have had to cooperate on an ever-expanding scale to capture water, to share its life sustaining benefits, to protect themselves from its fury, and, more recently, to protect it from their increasing means to pollute it. It is their cooperation that has made survival possible.’¹⁰³

The manifestation of an ecosystem approach within the context of shared rivers came with the development of the concept of minimum stream flow ‘in order to protect the ecological, chemical, and physical integrity of river systems.’¹⁰⁴ There is growing understanding of the concept of riverine ecosystem; which includes the protection of migratory species, wetlands, the marine environment, and biodiversity within the basin and the ecosystems throughout national jurisdictions.¹⁰⁵

International obligations of States both within their national jurisdictions and at the basin level can be gathered from the 1997 UNWC, which requires watercourse states to individually and, where appropriate jointly, protect and preserve the ecosystem of international watercourses.¹⁰⁶ In order to implement the protection and preservation of the ecosystem, watercourse states must consult with each other concerning the management of international watercourses through appropriate mechanisms, such as, the establishment of joint management or regulation.¹⁰⁷

The CFA is influenced by the UNWC on the obligation to protect and conserve the Nile River Basin and its ecosystems. The provision reads:

¹⁰³ Brown J., ‘Whisky’s fer Drinkin’; Water’s fer Fightn’! Is it?’; Resolving a Collective Action Dilemma in New Mexico’, 43 Nat. Resources J., 186 (2003).

¹⁰⁴ See Utton & Utton, ‘the International Law of Minimum stream Flows’, 10 Colo. J. Int’l Envtl. L., 7 (1999).

¹⁰⁵ Korhonen. I.M., ‘Riverine Ecosystems in International Law’, 36 Nat. Resources J. 481 (1996).

¹⁰⁶ UN Watercourses Convention, *supra* note 37, Article 20.

¹⁰⁷ *Id.*, Articles 24 and 25.

1. 'Nile Basin States shall take all appropriate measures, individually and, where appropriate, jointly, to protect, conserve and, where necessary, rehabilitate the Nile River Basin and its ecosystems, in particular, by:
 - a) protecting and improving water quality within the Nile River Basin,
 - b) preventing the introduction of species, alien or new, into the Nile River system which may have effects detrimental to the ecosystems of the Nile River Basin;
 - c) protecting and conserving biological diversity within the Nile River Basin;
 - d) protecting and conserving wetlands within the Nile River Basin; and
 - e) restoring and rehabilitating the degraded natural resource base.¹⁰⁸
2. Nile Basin States shall, through the Nile River Basin Commission, take steps to harmonize their policies in relation to the provisions of this article.

The above provision enunciates a general obligation to protect, conserve, and rehabilitate the Nile River and its 'ecosystem'. The CFA adopts the term 'protection' from the UNWC, while replacing the term 'preservation' in favour of the terms 'conservation' and 'rehabilitation'. According to some African water lawyers, 'preservation of water resources would imply the requirement that man totally desist from abstraction and consumptive utilization of water.'¹⁰⁹ This means, there is no substitute to water that might guarantee its quantitative preservation. According to this interpretation, the adoption of the term 'preservation' could be construed to mean that it affects the availability of water for agriculture, domestic and industrial uses in the Nile.

The implementation of transboundary ecosystem approach envisages a wider hydro-geographical ecology of indivisible resource; the problems compounding them; and the

¹⁰⁸ CFA, Article 6, *supra* note 45.

¹⁰⁹ Okidi, C.O., 'Preservation and Protection under the 1991 ILC Draft Articles on the Law of International Watercourses', 3 Colo. J. Env'tl. Int'l L. & Pol'y 146 -147 (1992).

solutions traversing the reaches of individual riparian States.¹¹⁰ In particular, the solutions require a multifaceted approach involving private, government, multilateral, and non-governmental bodies.¹¹¹ Moreover, the applicable laws must be multi-dimensional involving domestic laws, treaty laws as well as general international law.¹¹² It is in line with this notion that the CFA stipulated that ‘Nile Basin States shall, through the Nile River Basin Commission, take steps to harmonize their policies in relation to the provisions of this article.’¹¹³ The CFA requirements enable the Nile Basin states to facilitate individual and joint actions, including supportive national legal and institutional framework in maintaining the integrity of the ecosystems through the protection and conservation of water quality; biological diversity; wetland ecosystems; as well as the rehabilitation of degraded natural resources.

Harmonizing of activities underlying critical review of laws, policies, and organizational structures pertaining to water resources, land use, agriculture, environment, mining, and other related sectors could be vital inputs for the implementation of the CFA’s obligation to protect and conserve the Nile River Basin and its ecosystems.

Finally, the principle on ecosystem may be considered as simple, yet powerful,¹¹⁴ as it is interrelated with the principles of equitable utilization and no-significant harm.¹¹⁵ This

¹¹⁰ Karkkainen, B.C., Transboundary ecosystem governance: Beyond sovereignty?, in Bruch C. et al (ed.), Public Participation in the Governance of International Freshwater Resources, UN Univ. Press, Tokyo, (2005) at 75.

¹¹¹ McCaffrey, C.S., ‘The Work of the International Law Commission Relating to the Environment’, 11 Ecology L.Q., 189-190, (1984).

¹¹² Id.

¹¹³ The CFA, Article 6(2), *supra* note 45.

¹¹⁴ McCaffrey, S.C., ‘An Overview of the UN Convention on the Law of Non-Navigational Uses of International Watercourses’, 20 J. Land Resources & Env’tl. L. (2000) at 66.

¹¹⁵ The ILC Commentary, *supra* note 50 at 119.

relationship is vital, because ‘...causing significant harm to the ecosystems of an international watercourse should be considered *per se* inequitable and unreasonable.’¹¹⁶

2.8 Procedural Rules and the Duty to Cooperate

2.8.1 Overview

Procedural obligations under international watercourses law constitute an essential component in the implementation of the basic principle of equitable utilization.¹¹⁷ In stressing the influence of procedural rules in the evolution of substantive law, Professor Charles Bourne held that, ‘Shortcomings in substantive law, however, may be offset to some extent by a body of procedural law.’¹¹⁸

At the heart of procedural obligations is the duty to give notice, through regular exchange information and prior notification on planned measures. The exchange information and the implementation of the prior notification of planned measures in good faith among co-riparian States is a basis for cooperation on an optimal and sustainable use and development of international watercourse.¹¹⁹

2.8.2 Regular Exchange of Data and Information

The Framework Agreement underscores the importance of cooperation between the Nile Basin States based on equitable utilization and stresses the need for regular exchange of data and information and notification on planned activities. Article 7 sets the following requirements on data and information exchange:

¹¹⁶ McCaffrey S.C., ‘The UN Convention on the Law of the Non-Navigational Uses of International Watercourses: Prospects and Pitfalls’, in Salman S.M.A. & Boisson de Chazoumes, eds., *International Watercourses - Enhancing Cooperation and Managing Conflict*, Proceeding of the World Bank Seminar, World Bank Technical Paper No.414, (1998). See also Dombrowsky, I.; *International Water Management: An Economic Analysis*, in Van Den Burgh, J., (ed.), *Advances in Ecological Economics*, Edward Elgar Publishing Limited, U.K., (2007) at 66.

¹¹⁷ McCaffrey, ‘The law of international watercourses’, *supra* note 41 at 397.

¹¹⁸ Bourne, C.B., *Procedure in the Development of International Drainage Basins: Notice and Exchange of Information*, in Wouters, P.K., (ed.), *International Water Law, Selected Writings of Professor Charles B. Bourne*, Kluwer Law International, London, (1997) at 143.

¹¹⁹ McCaffrey, ‘The Law of International Watercourses’ *supra* note 41 at 398.

1. 'In pursuance of their cooperation concerning the use, development and protection of the Nile River Basin and its water resources, Nile Basin States shall on a regular basis exchange readily available and relevant data and information on existing measures and on the condition of water resources of the Basin, where possible in a form that facilitates its utilization by the States to which it is communicated.'
2. If a Nile Basin State is requested by another State to provide data or information that is not readily available, it shall employ its best efforts to comply with the request, but may condition its compliance upon payment by the requesting State of the reasonable costs of collecting and, where appropriate processing such data or information.¹²⁰

According to the above provision, the type of data and information requested by the State(s) to whom it is to be communicated is not confined to readily available data; but any data and information that are not readily available. The qualification to employ 'best efforts' in complying with the request could mean, 'to act in good faith and in a spirit of cooperation in endeavouring to provide the data or information sought by the requesting watercourse State.'¹²¹

2.8.3 Information Concerning Planned Measures

The obligation of prior notification and consultation on planned measures has developed into a widely recognized procedural rule. Article 3(8) of the CFA provides a general principle on information concerning planned measures, where the Nile Basin States exchange information on planned measures through the Nile River Basin Commission.¹²² The principle of prior notification had generated intense controversy within the Nile, as a result of which, the CFA has failed to come up with detailed procedures on the principle of planned measures. The countries have agreed that the issue should be handled by the future NRBC. However the CFA has incorporated the following general principles:

¹²⁰ The CFA, *supra* note 45, Article 7.

¹²¹ ILC Commentary, *supra* note 50 at 109.

¹²² The CFA, *supra* note 45, Article 3(8),

1. Nile Basin States agree to exchange information through the Nile River Basin Commission.
2. Nile Basin States shall observe the rules and procedures established by the Nile River Basin Commission for exchanging information concerning planned measures.¹²³

The debate over the issue prior notification on planned measures is not expected to be smooth during the future work of the NRBC during its work on the rules of procedures. The principle of planned measures has a profound national character; for the measures are national and the implementation is permitted by national States. Therefore, the implementation of the general principle under the CFA and future procedures to be developed by the NRBC require national laws and institutions supporting the generation and provision of technical data and information and the results of environmental impact assessment carried out at the national level.

Examination of the national laws and institutions in Ethiopia and Uganda in the coming chapters can, thus, highlight the potential impact on the implementation of principle of planned measures under the CFA.

2.8.4 Environmental Impact Assessment (EIA)

International law requires a watercourse State to provide timely specification accompanied, among other things by the result of any environmental impact assessment, in order to enable the notified States to evaluate the possible effects of the planned measures.¹²⁴ Article 9 of the CFA provides the following on Environmental impact assessment and audits:

1. For planned measures that may have significant adverse environmental impacts, Nile Basin States shall, at an early stage, undertake a comprehensive assessment of those

¹²³ Id., Article 8.

¹²⁴ Id., Article 12.

impacts with regard to their own territories and the territories of other Nile Basin States.¹²⁵

Based on the criteria and procedures to be developed by the Nile River Basin Commission for determining whether an activity is likely to have significant adverse environmental impacts,

‘A Nile Basin State that has implemented measures of the kind referred to in paragraph 1 shall conduct an audit of the environmental impacts of those measures. That State shall enter into consultations relating to the audit with Nile Basin States affected by the measures on their request.’¹²⁶

The CFA provisions recognize EIA as a national activity, which necessitates coordinated action between basin-wide criteria to be developed by the NRBC for carrying out audits of measures and supporting national legislations.¹²⁷ Therefore, EIA activities require harmonization and a link between international and national laws. The activities of the EIA also require the involvement of different stakeholder throughout the stages of the process.

2.8.5 Public Participation

Public participation and its development in international law discourse are more associated with international environmental law than international water law.¹²⁸ However, a number of notable provisions on public participation under environmental treaties also include auxiliary clauses on public participation with regard to transboundary water resources. For example, the 1992 UN-ECE Helsinki Convention requires riparian parties to make sure that ‘information on the conditions of transboundary waters, measures taken or planned to be taken to prevent, control and reduce transboundary impact, and the effectiveness of those

¹²⁵ Id., Article 9 (1).

¹²⁶ Id., Article 9 (3).

¹²⁷ Id., Article 9 (4).

¹²⁸ Ebbesson, J., Public Participation, in Bodansky et al, (ed.) the Oxford Handbook of International Environmental Law, Oxford University Press (2008) at 683.

measures, is made available to the public.’¹²⁹ The 2000 EU Water Framework Directive incorporates a clause on public participation.¹³⁰ Among conventions embodying the principle of public participation are the 1991 Espoo Convention,¹³¹ the UN Convention to Combat Desertification,¹³² the 1992 Convention of Biological Diversity¹³³ and Convention on access to information, public participation in decision making and access to justice in environmental matters.¹³⁴

There is no clear provision with regard to public participation under the UN Watercourses Convention; the only remotely close provision is Article 32, which relates to the issue of non-discrimination.¹³⁵ The absence of explicit provision under the UN Water Convention may strengthen the argument as to whether the principle of public participation is a customary norm of public international law.¹³⁶ However, whilst no expressive rule on public participation can be discerned from international water law within the UNWC, an increasing number of transboundary water agreements have begun recognising the right to public participation. Some of these instruments include, include, the 1994 Convention on

¹²⁹ UN ECE Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes (adopted March 17, 1992, entered into force 6 October 1996) 1936 UNTS 269, Article 16.

¹³⁰ Council Directive 2000/60/EC establishing a framework for Community action in the field of water policy (Water Framework Directive), Oct. 23, 2000 (entered into force Dec. 22, 2000) OJ (L 327).

¹³¹ Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991 (entered into force Sep. 10, 1997), reprinted in 30 I.L.M. 800 (1991).

¹³² Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, Oct. 14, 1994 (entered into force Oct. 14, 1994) U.N.T.S. 3 (1994).

¹³³ U.N. Convention on Biological Diversity, June 5, 1992 (entered into force Dec. 29, 1992), reprinted in 31 I.L.M. 849 (1992).

¹³⁴ Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters, Jun. 25, 1998 (entered into force Oct. 30, 2000), reprinted in 38 I.L.M. 517 (1999).

¹³⁵ Rieu-Clarke, A., ‘The Role and Relevance of the UN Convention on the Law of the Non-Navigational Uses of International Watercourses to the EU and its Member States’, 78 BYBIL, (2007) at 411.

See also Article 32, which provides,

‘Unless the watercourse States concerned have agreed otherwise for the protection of the interests of persons, natural or judicial, who have suffered or are under a serious threat of suffering significant transboundary harm as a result of activities related to an international watercourse, a watercourse State shall not discriminate on the basis of nationality or residence or place where the injury occurred, in granting to such persons, in accordance with its legal system, access to judicial or other procedures, or a right to claim compensation or other relief in respect of significant harm caused by such activities carried on its territories.’ See Watercourses Convention, *supra* note 37.

¹³⁶ See Woodhouse, M., ‘Is Public Participation a Rule of the Law of International Watercourses?’ 43 Nat. Resources J., (2003) at 137.

Cooperation for the Protection and Sustainable Use of the River Danube, which requires public authorities to avail information on the state or the quality of riverine environment in the Danube basin.¹³⁷ The 2003 Protocol for Sustainable Development of Lake Victoria Basin,¹³⁸ the Agreement on the cooperation for the sustainable development of the Mekong River Basin,¹³⁹ and the experience in South African river basins, all demonstrate the emerging strength of the concept of public participation in transboundary water management.¹⁴⁰

In addition to international discourse, a growing trend of internationalization of environmental and water issues within the domain of domestic fora¹⁴¹ has created the need for synergizing the implementation of public participation within the national laws. The CFA requires:

‘In planning and implementing a project pursuant to the principle of subsidiarity set forth in Article 3(3), Nile Basin States shall:

1. allow all those within a State who will or may be affected by the project in that State to participate in an appropriate way in the planning and implementation process;

¹³⁷ See Art 14, Convention on the Cooperation for the Protection and Sustainable Use of the Danube River, June 29, 1994 (entered into force Oct. 22, 1998) Available at <http://www.cawater-info.net/library/eng/l/danube.pdf>, accessed on 24 August 2010.

For a detailed analysis see, Rieu Clarke, A., ‘An Overview of stakeholder Participation-What Current Practice and Future Challenges? Case Study of the Danube Basin’, 18 Colo. J. Int’l Env’tl L. & Pol’y, (2007) at 611;

See Greenspan, et al, Public participation in the management of the Danube River: Necessary but neglected, in Bruch et al (ed.), *Public Participation in the Governance of International Freshwater Resources*, U.N. Univ. Press, Tokyo, (2005) at 101.

¹³⁸ Protocol for Sustainable Development of Lake Victoria Basin, 29 Nov. 2003, available at <http://www.africanwaterlaw.org/html/treatyprofile.asp?treatyid=156>, accessed on 25 August 2010.

¹³⁹ On the development of public participation in Mekong see Chomchai, P., Public Participation in watershed management in theory and practice: A Mekong River Basin perspective, in Bruch et al (ed.), *Public Participation in the Governance of International Freshwater Resources*, supra note 146 at 139.

¹⁴⁰ See Kidd, M. & Quinn, M., Public participation in Southern African watercourses; Ashton, P., & Neal, M., Public involvement in water resource management within the Okavango River Basin, in Bruch et al (ed.), *Public Participation in the Governance of International Freshwater Resources* supra note 147 at 156 and 169.

¹⁴¹ Wirth, D., ‘Public Participation In International Processes: Environmental Case Studies at the National and International Levels’, 7 Colo. J. Int’l Env’tl. L. & Pol’y (1991) at 1.

2. make every effort to ensure that the project and any related agreement is consistent with the basin-wide framework.¹⁴²

Experience of transboundary public participation in the Nile is carried out by a network of civil society organizations such as the Nile Basin Discourse, which seeks to influence projects and programs in the Nile Basin.¹⁴³ Legal arrangements and minimum standards on participatory legal structures, and access to information held by authorities dealing with the Nile issues, as well as their impact on the implementation of the CFA, can highlight the international-national nexus operating within CFA and domestic level. Moreover, the domestic laws and structures, administrative, judicial or independent remedies are the other aspect supporting the CFA's commitments for national implementation.

2.8.6 Dispute Resolution

There are varying definitions of the term 'dispute'; the usual usage of the term in the field of international watercourse *prima facie* designates unfettered problems arising among riparian states.¹⁴⁴ However, the term 'dispute' seems broad enough encompassing a spectrum of situations ranging from minor disagreements to serious controversies.¹⁴⁵ Likewise, the PCIJ, in the *Mavrommatis case* had defined 'dispute' as 'a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.'¹⁴⁶ Transboundary water disputes in many parts of the world involve peaceful resolution, while some have remained

¹⁴² The CFA, *supra* note 45, Article 10.

¹⁴³ 'The overarching objective of the Nile Basin Discourse (NBD) is to promote sustainable and equitable development, poverty reduction, and cooperation between all stakeholders in the Nile Basin. Working at the level of civil society engagement, the NBD seeks to maximize the social, economic and environmental benefits available to poor people within Nile countries and to ensure that there is a more equitable distribution of these benefits across the Nile basin as a whole.' See Nile Basin Discourse, available at http://www.nilebasindiscourse.org/index_EN.php, accessed on 31 July 2010.

¹⁴⁴ McCaffrey, *Water Disputes Defined: Characteristics and Trends for Resolving them*, in *The International Bureau of the Permanent Court of Arbitration* [hereafter referred to as IBPCA] (ed.), *Resolution of International Water Disputes*, Kluwer Law International, The Hague, (2003) at 49.

¹⁴⁵ *Id.*, at 51.

¹⁴⁶ See the *Mavrommatis case*, PCIJ, August 30th, 1924. Available at http://www.icj-cij.org/pcij/serie_A/A_02/06_Mavrommatis_en_Palestine_Arret.pdf?PHPSESSID=f6c41a8286a1a986aba3a1d96e7917e3, accessed on 25 August 2010.

challenging a number of efforts for resolving them, at times raising a question to peaceful coexistence.¹⁴⁷

The causes for transboundary water disputes vary in nature. Insufficient water to meet existing or future needs, or conflict of uses affecting the quantity and quality can lead to a clash of interests.¹⁴⁸ As the demand for water resources increase and conflicts over uses grow, watercourse States had to resort to different types of options, including, customary international law, transboundary water agreements or institutional mechanisms to resolve such conflicts.¹⁴⁹

The general principle of international law with regard to international disputes under the UN Charter requires States to, 'settle their international disputes by peaceful means in such a manner that international peace and security, and justice are not endangered.'¹⁵⁰ International water law (UNWC) also requires: 'In the event of a dispute between two or more parties concerning the interpretation or application of the present Convention, the parties concerned shall, in the absence of an applicable agreement between them, seek a settlement of the dispute by peaceful means...'¹⁵¹

The Nile is one of the basins where the issue disputes over water allocation largely remain unresolved. Key disputants in the basin are the downstream countries on one side and the rest of upstream basin States on the other side. The main source of the disputes revolve around the existing mechanisms for the Nile water allocation, which is characterized by

¹⁴⁷ Salman, M. A., Good Offices and Mediation and International Water Disputes, in International Bureau of the Permanent Court of Arbitration (ed.), *Resolution of International Water Disputes*, Kluwer Law International, The Hague, 2003 at 157.

¹⁴⁸ See Vinogradov, S., Wouters, P.K., Jones, P., 'Transforming Potential Conflict in to Cooperation Potential: the Role of International Water Law', PCCP, Publications, (2003) at 22, available at <http://www.unesdoc.unesco.org/images/0013/001332/133258e.pdf>, accessed 14 October 2012.

¹⁴⁹ Wouters, P.K., Universal and regional Approaches to Resolving International Water Disputes: What Lessons Learned from State Practice? in IBPCA (ed.), *supra* note 275 at 118.

¹⁵⁰ See United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, available at: <http://www.un.org/en/documents/charter/index.shtml>. Accessed on 20 June 2012.

¹⁵¹ Watercourses Convention, *supra* note 37, Article 33(1)..

contrasting levels of water utilization;¹⁵² where Egypt and Sudan allocated the entire flow among themselves through colonial and bilateral treaties. The CFA puts in place some procedures for resolving disputes application and interpretation regarding substantive and procedural principles, such as, equitable utilization; no significant harm and a number of procedural issues in the Framework Agreement. The CFA provides,

‘In the event of a dispute between two or more Nile Basin States concerning the interpretation or application of the present Framework, the States concerned shall, in the absence of an applicable agreement between them, seek a settlement of dispute by peaceful means...’¹⁵³

Dispute settlement mechanisms adopted by the CFA include, negotiation, good offices, mediation, conciliation by the NRBC or other third party arbitration, or submission to the International Court of Justice (ICJ).¹⁵⁴ Any of the parties may as last resorts refer its case to a Fact Finding Commission, although its decision remains non-binding.¹⁵⁵

With regard to the role of national laws, the CFA makes no reference to the right to judicial access or compensation claims in dispute resolutions involving non-citizens.¹⁵⁶ However, the role of the national laws and institutions supporting dispute settlement is examined in the subsequent chapters of the thesis.

2.9 Institutional Aspect: Joint Management under the CFA

2.9.1 Overview

Institutions for the joint management of transboundary water resources are considered essential mechanisms for ensuring cooperation, prevention and resolution of disputes.¹⁵⁷ Joint institutions must endure the test of time as mechanisms for solving problems through

¹⁵² Cascão, A., ‘Changing Power Relations in the Nile River Basin: Unilateralism vs. Cooperation?’, 2(2) WaA, (2009), at 247. Available at www.water-alternatives.org, accessed on 02 August 2010.

¹⁵³ See the CFA, *supra* note 45, Article 34 (1).

¹⁵⁴ *Id.*, Article 34 (1) (a).

¹⁵⁵ *Id.*, Article 34 (1) (b).

¹⁵⁶ Watercourses Convention, *supra* note 37, Article 32.

¹⁵⁷ Boisson de Chazournes, L., The Role of Diplomatic Means of Solving Water Disputes: A Special Emphasis on Institutional Mechanisms, in IBPCA (ed.), *supra*, note 275 at 100.

diplomatic and cooperative solutions between riparian States, which usually have different history, culture, economy, and in many cases mistrust between them.¹⁵⁸ While the call for joint institutions and commissions for the management of international watercourses remains strong, the content of the provisions dealing with joint institutions for the management aren't sufficiently dealt under international water law.¹⁵⁹ For instance, the UNWC provides lacks detailed rules, except permissive provisions, whereby:

‘In determining the manner of such cooperation, watercourse States may consider the establishment of joint mechanisms or commissions, as deemed necessary by them, to facilitate cooperation on relevant measures and procedures in the light of experience gained through cooperation in existing joint mechanisms and commissions in various regions.’¹⁶⁰

The UNWC leaves the discretion to Watercourse States to request for ‘consultation concerning the management of an international watercourse, which may include the establishment of a joint management mechanism.’¹⁶¹ However, some stronger models for such requirement can be observed in other international instruments such as the 1992 UNECE Convention.¹⁶²

As a joint body for the management and sustainable development of the Nile River Basin,¹⁶³ the objectives of the Nile River Basin Commission (NRBC) are:

- a) To promote and facilitate the implementation of the principles, rights and obligations provided for in the present Framework;
- b) To serve as an institutional framework for cooperation among Nile Basin States in the use, development, protection, conservation, and management of the Nile River Basin and its waters;

¹⁵⁸ Mumme, S., ‘Innovation and Reform in Transboundary Resource Management: A Critical Look at the International Boundary and Water Commission, United States and Mexico.’ 33 Nat. Resources J., (1993) at 93.

¹⁵⁹ Boisson de Chazournes, *supra*, note 157 at 102-103.

¹⁶⁰ Watercourses Convention, *supra* note 45, Article 16.

¹⁶¹ *Id.*, Article 21.

¹⁶² See the 1992 UN ECE Helsinki Convention, *supra* note 129.

¹⁶³ See Preamble, CFA, *supra* note 45.

- c) To facilitate closer cooperation among the States and peoples of the Nile River Basin in the social, economic, and cultural fields.¹⁶⁴

The Conference of the Heads of State and Government is the supreme policy making organ of the Commission,¹⁶⁵ while the governing body, i.e.; the Council of Ministers is given a wide range of powers, which includes overseeing the implementation of the Framework Agreement;¹⁶⁶ the power to examine and decide the determination of equitable utilization in each riparian country in accordance to the factors provided under the CFA and the power to resolve disputes between Nile Basin States on the interpretation and application of the Framework Agreement.¹⁶⁷ The structure of NRBC incorporates the Technical Advisory Committee (TAC); Sectoral Advisory Committee (SAC); and a Secretariat.¹⁶⁸ The joint management structure exhibits a prototype of a joint management institution of an international watercourse, while its implementation requires corresponding national arrangements.

2.9.2 Sub-Basin and National Management

Based on the concept of subsidiarity the CFA recognizes the utility of sub-basin organizations and arrangements. Basin States which are parties to both the Framework and sub-basin organizations and arrangements are obligated to ensure that the purpose, functions and activities of the sub-basin organizations or arrangements are consistent with those of the NRBC and its rules and principles.¹⁶⁹ Parties to the sub-basin arrangements which are also parties to the CFA are required to ensure cooperation with the NRBC and support its closer contact with sub-basin organizations or arrangements.¹⁷⁰

¹⁶⁴ Id., Article 16.

¹⁶⁵ Id., Article 21.

¹⁶⁶ Id., Article 22.

¹⁶⁷ Id. Article 24(12).

¹⁶⁸ Id. Articles 25, 26 and 27.

¹⁶⁹ Id., Article 32(2).

¹⁷⁰ Id., Article 32(3).

The Nile model provides a cooperative relationship between the basin-wide NRBC and the sub-basin organizations or arrangements. In addition to the sub-basin arrangements, successful implementation of an international watercourse or basin development and management require a concerted action by governments, acting through some office or institutional mechanism.¹⁷¹ In this regard, the CFA demands each Basin State to establish or designate a National Nile Focal Point Institution that can serve the NRBC to deal with matters within its mandates.¹⁷² Accordingly, the implementation of equitable utilization; procedures on data and information exchange; procedures on planned measures; procedures for EIA and audits; and water security, all require national institutions to facilitate and act at domestic level.¹⁷³

The National Nile Focal Point Institutions are instrumental in supporting and carrying out the NRBC's mandates under the CFA at national levels. The linkages with national organs at different levels in Ethiopia and Uganda can be crucial for effective functioning of the NRBC as explored under Chapter 3.

2.10 Conclusion

The analysis and understanding of the normativity of the rules of the CFA is of enormous importance for ascertaining the support of national laws in the case studies of this thesis. By analysing the core elements in the CFA the examination of national laws the supportive role they play and shortfalls in terms of the implementation of the rules of CFA can be advanced. An in-depth analysis of the architecture of the substantive and procedural obligations of the CFA can trigger the needs for the harmonization of domestic laws and policies, or a change of such policies or laws, issues to be addressed in subsequent chapters of the thesis. The

¹⁷¹ Radosevich, G.E., 'Implementation: Joint Institutional Management and Remedies in Domestic Tribunals, (Articles 26-28, 30-32)', 3 *Colo. J. Int'l Env't'l L. & Pol'y* (1992) at 262.

¹⁷² The CFA, Article 33, *supra* note 49.

¹⁷³ *Id.* See Articles 4, 5, 6, 8.

institutional aspect of the CFA, which is based on the concept of subsidiarity, including national focal points offers to seek the role of domestic institutional structures for the implementation of the mandates of the CFA.

CHAPTER 3

DOMESTIC SYNTHESIS ON SUBSTANTIVE RULES AND PRINCIPLES IN THE ETHIOPIAN AND UGANDAN LEGAL SYSTEMS

3.1 Introduction: An overview of Ethiopian and Ugandan National Laws

The study of the origin of African legal systems reveals a mixed system of colonial and indigenous laws, which often are difficult to interpret or apply.¹⁷⁴ The development of legal system in Africa is part of social and economic transformation following the independence of large majority of States from colonialism in the 1960s.¹⁷⁵ Ethiopia and Uganda both adopt largely western-style legal systems with customary and religious practices playing important roles. By reviewing the legal systems of the two countries, this chapter will evaluate to what extent their existing policies, laws, regulations and institutions impact the implementation of basic principle of international water law as agreed in the CFA. The intention is to address the question: "How and to what extent, do national laws and institutions support or hinder the implementation of and compliance with international obligations?"

¹⁷⁴Stibich, R., 'Family Law in Some English Speaking African States', 2 Afr. L. Stud., (1969) at 49.

¹⁷⁵Sedler, R.A., 'The Development of Legal Systems: the Ethiopian Experience', 53 Iowa L. Rev., (1967-1968) at 562.

The analysis is to ultimately address the issue on whether a combined study of water law (international and national) offer a better understanding of how national laws and institutions support the implementation of international commitments.

3.2 Analysis of the Ethiopian and Ugandan Legal Systems

3.2.1. The Ethiopian Legal System

The development of legal system in Ethiopia can be comprehended through references of the country's history, geography, and internal and external conflict.¹⁷⁶ Although this thesis does not intend to dwell on historical analysis, it is important to note that the institutional evolution is part of its ancient civilization dating back to 4000-5000 years.¹⁷⁷ The growth or decline of institution can be associated with the strength or weakness of the decline of the Aksumite Empire, which was followed by the Agew State, Medieval Atse State, the Zemene Mesafent, and lastly the modern era of written constitutions.¹⁷⁸ However, the historical records beginning from the end of the fifteenth Century indicate little definitive legal and institutional development; a confirmation of recent development of legal system in Ethiopia.¹⁷⁹ Among the main reasons for the slow development are; lack of stability; resistant to modern changes and the centralization and monopolization of institutions by the medieval Ethiopian monarchies.¹⁸⁰

¹⁷⁶Habte-Sellassie, B., 'Constitutional Development in Ethiopia', 10 J. Afr. L., (1996) at 74.

¹⁷⁷Henze, P.B., 'Layers of Time: A History of Ethiopia', Hurst & Company, London, (2000) at 27. Until its decline in the seventh Century, Aksum with its capital, Adulis, a Red Sea port of international repute had become an integral part of in the Mediterranean commerce of international repute. See Zewde, B., 'A History of Modern Ethiopia 1855-1974', Addis Ababa University Press, (2000), at 8.

¹⁷⁸ See Nahum, Fasil, 'Constitution for a Nation of Nations', the Red Sea Press, Inc., (1997), at 3-14. After the decline of the Aksumite Kingdom, the Zagwe dynasty (Agew) took power for three centuries, with its seat in the Abbay Basin. This was followed by the restoration of the Solomonic Dynasty towards the end of the thirteenth Century in Shewa. The medieval Atse State gave way to the era of Zemene Mesafint (the era of the Princes), which led to the breakdown of the Empire, and later, the eventual reunification of the Empire of Ethiopia. The last period has ushered in the period of written constitutional order.

¹⁷⁹ Habte-Sellassie, supra note 186 at 186.

¹⁸⁰ Id.

3.2.2 The Fetha-Negest (Law of the Kings)

The first Ethiopian written law, known as the ‘Fetha-Negest’ or the ‘Law of the Kings’, which was compiled around 1240 comprised rules governing spiritual and temporal matters, including water use.¹⁸¹ Among the rules on water administration, were the rule not to cause harm to downstream users; the right to compensation by downstream inhabitants for the fertile soil provided to downstream users; the right to draw water (*aqua haustus*); rules on access points and soil erosion.¹⁸² Despite the existence of these rules, no institutional or enforcement mechanisms can be traced to draw experience on their implementation. This is due to the lack of records in the country.

3.2.3 The Constitutional development

The first modern constitution, which promulgated in 1931,¹⁸³ was replaced by the 1955 Revised Constitution. The later constitution introduced centralized and modern institutions and administration of justice.¹⁸⁴ Public property right over natural resources, including water resources was introduced into the constitution and its administration was made the State’s responsibility.¹⁸⁵ The constitution made the guarantor of sacred trust of all the natural resources of the country (water, forests, land, air, lakes, rivers and ports) for the benefit of the present and succeeding generations of the Ethiopian people.¹⁸⁶ The notion of ‘benefit of the present and succeeding generations’ could be aligned to the modern principle of sustainable

¹⁸¹ Abba Paulos Tzadua, *The Fetha Negest, the Law of the Kings*, Strauss, P.L., (ed.), available at <http://www.cap-press.com/pdf/1888.pdf>, accessed on 02 Jan. 2011.

¹⁸² Fetha Negest, Amharic & Gé ez version, 5th ed., Tensa’e Publishers (1998), quoted in 1998), quoted in Arsano, Y., ‘Ethiopia and the Nile, Dilemmas of National and Regional Hydropolitics’, a PhD thesis, ETH Zurich and Yacob Arsano, (2007), available at www.isn.ethz.ch, accessed on 31st March 2011.

¹⁸³ Steen, W.M., *The Ethiopian Constitution, 1931*, the Ethiopian Research Council, Washington D.C., (1936), available at http://ia600307.us.archive.org/14/items/TheEthiopianConstitution/EC_text.pdf, accessed on 31st March 2011.

¹⁸⁴ Revised Constitution of the Empire of Ethiopia, Proclamation No. 149 of 1955, *Negarit Gazeta*, 15th year, No 2, (1955).

¹⁸⁵ Id., Article 130.

¹⁸⁶ Id.

development. It further required, the exploitation of natural resources must be in accordance with the principles of laws established for their conservation.¹⁸⁷

3.2.4 The Ethiopian Civil Code

The Civil Code, which was promulgated in 1960, provided specific provisions regarding ownership and use of water. It also sets out provisions for the administration, control and preservation of all surface and ground water by a competent authority and afforded water use priority to the community.¹⁸⁸ Private ownership is restricted to water collected in a man-made reservoir, basin or cistern.¹⁸⁹ Courts are given the power to resolve water disputes between users where, ‘in deciding on a dispute arising between two persons to whom water may be of use, the court shall reconcile the conflicting interests with the respect due to ownership.’¹⁹⁰ The law recognizes riparian right, in which, ‘a landowner may use the water on, below, running through or bordering his land for his personal use.’¹⁹¹ The law protects ownership rights by imposing compensation for its infringement.¹⁹²

Partial riparian rights is further reflected in the Civil Code, where a land owner possess the right of use of water running through his land for irrigation, provided that such use is not detrimental to the vested interest of downstream users.¹⁹³ Such right may be challenged and its suspension request by downstream users in a court of law.¹⁹⁴ However, the law is inclined toward protecting riparian rights by setting additional requirements on downstream victim of the ham; i.e.; to pay compensation to the upstream user for enforcing the suspension of

¹⁸⁷ Id.

¹⁸⁸ Negarit Gazeta of the Empire of Ethiopia, Civil Code of the Empire of Ethiopia, Proclamation No. 165/1960, 19th Year No.2, Addis Ababa, 5th May 1960, Article 1228 (2).

¹⁸⁹ Id. Article 1229.

¹⁹⁰ Id., Article 1231 (1).

¹⁹¹ Id., Article 1232.

¹⁹² Id., Article 1231 (2).

¹⁹³ Id., Article 1236.

¹⁹⁴ Id.

upstream use.¹⁹⁵ Most of the above Civil Code provisions are only applicable as far as they are consistent with the new water laws. It may, therefore, require amendment of the provisions of the Civil Code and update with existing water law developments in Ethiopia.

3.2.5 The 1957 Ethiopian Penal Code and the 2004 Criminal Code

The Penal code provided important provisions for enforcement of infringements pertaining to contamination of water, pastoral land, agricultural or forest crops under offences against public health. The Penal Code provides rigorous punishment for intentionally contaminating drinking water serving the needs of man or animals by means of substances harmful to health.¹⁹⁶ Intentional poisoning of wells or cisterns, springs, water holes, rivers or lakes also are also prohibited under the Penal Code. The Penal Code is supportive legal instrument for the enforcement of environmental crimes and can be useful for the implementation of international water law commitments.¹⁹⁷

3.2.6 The 1987 Constitution

The 1987 constitution declared land, minerals, waters and forests as State property and laid down provisions for the protection natural resources, including water and wildlife.¹⁹⁸ A proclamation for the nationalization of land was introduced; effectively abolishing private ownership of land and paving the way for a highly centralized state ownership and governance of natural resources of the country.¹⁹⁹ The management of transboundary water resources began to get attention during this period and more in the following period with the promulgation of the current constitution.

¹⁹⁵ Id., Article 1233, Articles 1236-1240.

¹⁹⁶ The Criminal Code of the Federal Democratic Republic of Ethiopia (2004), Proclamation No. 404/2004, Addis Ababa, Ethiopia, Articles 517-524. See also Penal Code of the Empire of Ethiopia, Nagarit Gazeta of the Empire of Ethiopia, Proclamation No. 158/1957, 16th Year, No.1, Addis Ababa, 23 July 1957, Articles 506 and 507.

¹⁹⁷ See Mwebaza et al, 'Situation Report: Environmental Crimes in Ethiopia', Institute for Security Studies ISS), (2009), available at <http://www.iss.co.za/uploads/EnvironCrimesEthioJul08.pdf>, accessed on 3 Feb, 2011.

¹⁹⁸ The Constitution of the People's Republic of Ethiopia, (1987).

¹⁹⁹ Nagarit Gazeta of the Provisional Military Government, Proclamation No. 31/1975, Public Ownership of Rural Lands Proclamation, Nagarit Gazeta, 34th Year No. 26, Addis Ababa, 29th April 1975.

3.2.7 The current constitution

The current constitution was proclaimed in 1995 establishing a Federal system comprising the Federal Government and nine regional States as the members of the Federation.²⁰⁰ The constitution distributed rights and duties between the Federal Government and regional states; including such the rights as enacting constitutions, laws and establishing legislative, executive and judicial organs by the States.²⁰¹ However, ownership of the rural and urban land, all natural resources, including water in the States became an exclusive mandate of the Federal Government.²⁰² Therefore, under this constitution, the power to determine and administer the utilization of the waters or rivers and lakes linking two or more States or crossing the boundaries of the national territorial jurisdiction belongs to the Federal Government.²⁰³ The Federal Government is, thus, empowered, among other things, to ‘enact laws for the utilization and conservation of land and other natural resources’.²⁰⁴

The above examination of legal development exhibits a consistent shift towards a stronger state ownership of natural resources, while demonstrating a stronger transboundary setting conducive for the implementation of international commitments.

3.2. 8 The Legislature (Ethiopia)

The House of Peoples’ Representatives (HPR) is equivalent to a lower house of parliament in the UK. Generally, it is the highest authority of the Federal Government, which formulates

²⁰⁰ The Constitution of the Federal Republic of Ethiopia, (1995), supra note 62. Article 50.

²⁰¹ Id., Article 50 and Article 47. The Federal Democratic Republic of Ethiopia is composed of a federal government, nine member states, and two administrative areas (chartered cities). The member states are: Afar National Regional State; Amhara National Regional State; Benishangu/Gumuz National Regional State; Gambella National Regional State; Harari National Regional State; Oromiya National Regional State; Somali National Regional State; Southern Nationals, Nationalities and Peoples Regional State, Tigray National Regional State. Addis Ababa and Dire Dawa Administrative Councils are made administrative cities, while the city of Addis Ababa also serves as the federal capital city.

²⁰² Id., Article 40 (3).

²⁰³ Id. Article 51 (11).

²⁰⁴ Id., Article 51(5).

and implements the laws of the country.²⁰⁵ As it was mentioned above one of the important powers impacting transboundary water resources is the power to enact laws for the utilization and conservation of land and other natural resources, and the power to determine and administer the utilization of inter-state and transboundary rivers and lakes.²⁰⁶ However, regional States are also entitled to administer land and other natural resources within their respective territories; but in accordance with the Federal laws.²⁰⁷ However, the constitution offers flexible provisions, where the Federal Government may delegate its powers to the Federal States in order to allow them carry out such functions.²⁰⁸ This, however, must be construed to mean that such delegated powers do not include matters relating to transboundary water resources, such as negotiating watercourses treaties, and the direct implementation of international commitments; a power firmly put in to the hands of the Federal Government.

3.2.9 The Judicial System (Ethiopia)

Judicial power is vested in Federal and State courts, where the State Supreme Court exercises concurrent jurisdiction of a Federal High Court.²⁰⁹ The Constitution provides that every person has the right to bring justiciable disputes to, and acquire a decision or judgement by a court of law or any other competent body with judicial power.²¹⁰ The extent of the right to justice in matters such as environmental and water resource disputes; the procedure for setting in motion such rights; the responsible bodies and their jurisdictional character as judicial, quasi-judicial or administrative tribunals, depend on the type of the disputes and the powers defined by law with respect to the matters. The question of judicial recourse with

²⁰⁵ Id., Article 55.

²⁰⁶ Id., Article 51 (2,5, 11)

²⁰⁷ Id., Article 52 (2) (d).

²⁰⁸ Id., Article 50 (9).

²⁰⁹ Id., Article 80 (2).

²¹⁰ Id., Article 37(1)

regard to transboundary water resources issues can be determined with the entering into force of the CFA and harmonization of national laws allowing access to justice.

The constitutional development as observed above has relevant provisions applicable within the transboundary setting. But the support in the implementation of CFA commitments must be supported by specific national laws providing facilitative roles.

3.3 The Ugandan Legal System

The constitutional development in Uganda has gone through colonial, military *coup d'état*, or civil strife.²¹¹ The legal system is influenced by the English Common Law and African customary law, the latter, according to the current legal system is applicable only if it does not conflict with statutory laws.²¹² Uganda had undergone three constitutional transitions since its independence; the first constitution, which was promulgated in 1962 and was replaced by the 1967 Constitution.²¹³ A new Constitution enacted in 1995 established the existing Republic of Uganda, with an executive President as the head of State.²¹⁴

The State has the mandate for the control of basic natural resources, including land, water, wetlands, minerals, oil, fauna and flora.²¹⁵ It also provides general principles pertaining to the formulation of legal and policy framework within which the water sector legislations, policies and plans are developed.²¹⁶ The decentralization of power in the initiation of policies and implementation of plans for water resources development has been recognized as part of

²¹¹ The Report of the Uganda Constitutional Commission. Analysis and Recommendations, (1993), available at <http://home.heinonline.org/>. Accessed on 24 January 2011.

²¹² Mahoro, B., Uganda's Legal System and Legal Sector, available at <http://www.nyulawglobal.org/globalex/uganda.htm>, accessed on 24 January 2011.

²¹³ The Report of the Uganda Constitutional Commission, supra note 223.

²¹⁴ Mahoro, B., supra note 224 at 238.

²¹⁵ Article XIII, the Constitution of the Republic of Uganda, (1995), World Constitutions, available at <http://heinonline.org/HOL/Page?handle=hein.cow/zzug0001&collection=cow>, accessed on 16 January 2011.

²¹⁶ See Uganda National Water Development Report, 2005, 2nd World Development Report 'Water a Shared Responsibility', (2006), available at <http://unesdoc.unesco.org/images/0014/001467/146760e.pdf>, accessed on 16 January 2011.

democratic governance.²¹⁷ The constitution incorporates the right to development with a view to facilitating rapid and equitable utilization of natural resources and encourages private initiative.²¹⁸ The right to development is acknowledged here as part of human rights intended to enhance the role of both the people and State in promoting balanced and equitable development.²¹⁹ The constitution ensures that the State makes effort to fulfil the rights to clean and safe water; the right to clean and healthy environment; the right to access to information; and the right to just and fair treatment in administrative decisions.²²⁰ The principle of sustainable development is addressed in the constitution, with the promotion of public awareness in the management of land, air and water resources for present and future generation.²²¹ The rights to access clean and safe water and a healthy environment have been recognized as fundamental rights of all Ugandans.²²² Control of pollution; the conservation of natural resources; and the protection of biodiversity are commitments set under the Ugandan Constitution.²²³

3.3.1 Legislative and executive organs

The legislature is the supreme body, which protects the Constitution and promote the democratic governance of Uganda, and, therefore, vested with the power to make laws on all matters of development.²²⁴ The Executive branch is symbolized by the President, which is the Head of State,²²⁵ while the function of the cabinet includes the mandate of the Ministry of

²¹⁷ Id., According to Article II (iii) ‘the government shall be guided by the principle of decentralization and devolution of governmental functions and powers to the people at appropriate levels where they can best manage and direct their own affairs.’

²¹⁸ Constitution of the Republic of Uganda, *supra* note 215, Article IX

²¹⁹ Id. Article X.

²²⁰ Id., See Articles XII-XXI, XIV(b), Articles 39, 41, 42.

²²¹ Id., Article XXVII (ii).

²²² Id., Article XIV (b).

²²³ Id., Article XXVII (iii).

²²⁴ Id., Article 79(1).

²²⁵ Id., Article 98 (1).

water resources, land and environment, which determines, formulates and implement the decisions of the Government with regard to transboundary water resources.²²⁶

3.3.2 The Judiciary

The Ugandan judicial system consists of the Supreme Court, the Court of Appeal and the High Court of Uganda.²²⁷ The judiciary is expected to adhere to the basic principles in the administration of justice; which include, the requirement that justice be done to all irrespective of their social or economic status; that justice must not be delayed; that adequate compensation must be awarded to victims of wrongs; that reconciliation between parties must be promoted; and that justice shall be done without being strict on technicalities.²²⁸ These principles are worth mentioning as they are directly relevant rights in transboundary water resources and transboundary environmental issues.

The development of legal system in Uganda differs from that of Ethiopia as the former is based on traditional customary practices and colonial legacy, while Ethiopia's legal development had been the result of sustained written legal manuscript; as observed in its water administration under the Fetha-Negest and the Ethiopian Civil Code. The State controls important natural resources, including land, water, wetlands, minerals, oil, fauna and flora; in both cases.²²⁹

3.4 Modern Water Law in Ethiopia and Uganda

3.4.1 National Water Legislation in Ethiopia

The development of Ethiopian water resources management can be characterized as evolutionary. There had been no water policy until the 1999, where the Ethiopian Water

²²⁶ Id., Article 111(2).

²²⁷ Constitution of the Republic of Uganda, *supra* note 215, Article 129 (1) (a-c).

²²⁸ Id., Article 126 (1-2) (a-e) and Article 128.

²²⁹ The Constitution of the Republic of Uganda, *supra* note 215, Article XIII.

Resources Management Policy was put in place for the first time.²³⁰ The overall objective of the policy is:

‘to enhance and promote all national efforts towards the efficient, equitable and optimum utilization of the available Water Resources of Ethiopia for significant socioeconomic development on sustainable basis.’²³¹

The policy affirms water as a natural endowment commonly owned by all the peoples of Ethiopia; and as far as conditions permit every citizen shall have access to sufficient water of acceptable quality to satisfy basic human needs.²³² Water is considered an economic and social good. Social equity, economic efficiency, stakeholder participation are included with the policy principles.²³³

On transboundary waters, the policy principles promote the establishment of an integrated framework for joint utilization, equitable cooperation and agreement.²³⁴ They equally ascertain and promote Ethiopia’s entitlement and use of transboundary waters based on accepted international norms and conventions endorsed by country.²³⁵ The policy adopts joint basin agreement and joint and efficient use of transboundary waters based on ‘equitable and reasonable’ use principles.²³⁶ The policy on transboundary water management provides for the compliance of international agreements adopted by Ethiopia.²³⁷

The implementation of international watercourse treaties has been formally recognized as policy principle affords the importance Ethiopian water policy and its implication on CFA.

3.4.2 The Ethiopian Water Sector Strategy

²³⁰ Ethiopian Water Resources Management Policy, Ethiopian Federal Democratic Republic of Ethiopia, Ministry of Water Resources, (1999). (Copy with the author).

²³¹ *Id.*, at 1.1.

²³² *Id.*, 1.2-1.3.

²³³ *Id.*

²³⁴ *Id.*, 2.1.2.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

The overall goal of the 2001 Water Sector Strategy is, ‘to enhance and promote all national efforts towards the efficient, equitable and optimum utilization of the available water resources of Ethiopia for significant socio-economic development on a sustainable basis.’²³⁸

Transboundary water strategy include, active participating in regional arrangements, such as the Nile Basin Initiative (NBI); assessment and identification of transboundary water issues that require cooperation; and the establishment of national consultative groups and public participation on transboundary water issues.²³⁹

3.4.3 The Water Sector Development Program

The 2002 Water Sector Development Program translates the principles of the water policy and the water strategy into action. A planning horizon of 15 years (2002-2016), to be implemented through short, medium and long term periods was envisaged,²⁴⁰ sectoral plans and prioritizes actions and programs on the development of water supply and sewerage, irrigation, hydropower, water resources, institution and capacity building.²⁴¹

3.4.4 The Ethiopian Water Resources Management Proclamation

The development of regulatory framework in the process of water resources management is intended to advance the country’s poverty reduction and sustainable development programs.²⁴² Some of the fundamental principles of the Ethiopian Water Resources Management Proclamation are:²⁴³

²³⁸ Ethiopian Water Sector Strategy, the Federal Democratic Republic of Ethiopia, Ministry of Water Resources, (2001) at 1.

²³⁹ Id., 4.1.4.

²⁴⁰ Water Sector Development Program, the Federal Democratic Republic of Ethiopia, Ministry of Water Resources, (2020).

²⁴¹ Id.

²⁴² See Ethiopia: Sustainable Development and Poverty Reduction Program (PRSP), Federal Democratic Republic of Ethiopia (FDRE), Ministry of Finance and Economic Development (MOFED), (2002) at 82; A Plan for Accelerated and Sustained Development to End Poverty (PASDEP), Vol. I, Main Text. Ministry of Finance and Economic Development (MoFED), (2005/06-2009/10), Addis Ababa, (2006) at 127. (Copies with the author).

²⁴³ Federal Negarit Gazeta, of the Federal Democratic Republic of Ethiopia, Proclamation No. 197/2000, Ethiopian Water Resources Management Proclamation, Article 6.

- 1) The Integrated Basin Master Plan Studies and Water Resources legislative framework shall serve as point of reference and ensure that any water resource is put to the highest social and economic benefit of the people of Ethiopia.
- 2) The social and economic development programmes, investment plans and programmes and water resources development activity of any person, shall be based on the country's Water Resources Policy, the relevant Basin Master Plan Studies and Water Resources laws.
- 3) The Supervising body shall ensure and administer that the management of any water resource is put to the highest social and economic benefit of the Ethiopian people in accordance with provisions of the Ethiopian Water Resources Policy, Basin Master Plan Studies and Water Resources laws.
- 4) Management of the water resources of Ethiopia shall be in accordance with a permit system.

The Ethiopian Water Resources Management Proclamation, which was proclaimed in 2000 is the first comprehensive modern Ethiopian water law and has the purpose to ensure the protection and utilization of water resources for the highest social and economic benefits and oversee the conservation, prevention of harmful effects to water resources.²⁴⁴

3.4.5 Integrated Master Plan Studies

Master plan studies conducted on a number of river basins constitute a basis for national and joint development of water resources of the country. The selection of irrigation and hydropower projects under ENSAP were based on national basin master plan studies undertaken on the Abbay, Tekeze and Baro-Akobo river basins.

3.4. 6 Other related laws

Various inter-sectoral policies, laws and institutions have positive or negative impact the governance of water resources management and may affect the implementation of international commitments under the CFA at national or regional levels. The most important laws and corresponding institutions are environment, agriculture, health, foreign affairs, and

²⁴⁴. Id., Article 3.

finance and investment. Inter-sectoral policies and institutions can offer principles supporting the implementation of transboundary water agreements, while their contradictions may provide opportunity for legal reform or amendment.

3.4.7 The Implementation of International Agreements

The Ethiopian Constitution stipulates: ‘All international agreements ratified by Ethiopia are an integral part of the law of the land’.²⁴⁵ International agreements are negotiated by the executive and are ratified by the House of People’s Representative.²⁴⁶ The 1995 and the 2002 proclamations gave the mandate to undertake studies and negotiations of treaties to the Ministry of Water Resources. Whether the negotiations of treaties include the signing can be observed from the Vienna Convention on the Law of Treaties, where negotiation deemed to include drawing up, adoption signature of the text of the treaty.²⁴⁷ The Ministry can as a matter of law sign international agreements relating to transboundary rivers²⁴⁸ and follow up their implementation.²⁴⁹

Finally, treaties negotiated and concluded by the executive must be ratified by the House of the People’s Representatives, and gazetted in the *Nagarit Gazette* in order to become part of the domestic legal system.²⁵⁰

²⁴⁵ The Constitution of the FDRE, supra note 62, Article 9(4).

²⁴⁶ Id., Article 55 (12).

²⁴⁷ Article 2(e), The Vienna Convention on the Law of Treaties, 8 I.L.M. 702(1969), (adopted on 22 May 1969), available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf, accessed on 05 April 2011.

²⁴⁸ A Proclamation to Provide for the Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia, Proclamation No. 4/1995, *Federal Negarit Gazeta* of the Federal Democratic Republic of Ethiopia, Article 17 (8), 1st Year No. 4, Addis Ababa, 23rd August 1995.

²⁴⁹ Proclamation to Provide for the Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia, *Federal Negarit Gazeta* of the Federal Democratic Republic of Ethiopia, Proclamation No. 471/2005, 12th Year No. 1 Addis Ababa, 17th November 2005.

See also A Proclamation to Provide for the Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia; Proclamation No. 691/2010, 17th Year No.1, Addis Ababa, 27th October 2010.

²⁵⁰ The Constitution of the FDRE, supra note 62. See Article 55 (12). According to Article 9(4), ‘All international agreements ratified by Ethiopia are an integral part of the law of the land.’

3.5 National Water Legislation in Uganda

According to Uganda's National Development Plan, economic activities has increased the demand for domestic water consumption, livestock, industry, hydropower generation, irrigated agriculture, marine transport, fisheries, waste discharge, tourism, and environmental conservation.²⁵¹ The need for equitable use, integrated and sustainable management of the water resources has taken centre stage in national development strategy.²⁵² Among the policies and legislation constituting Uganda's legal framework for the water sector, the National Water Policy, the Water Statute, Water Act, and the Local Government Act are some of the important legal instruments.

3.5.1 Ugandan National Water Policy

The National Water Policy was adopted in 1999 in order to address the current water management issues and adopted the objectives and strategies formulated under the Water Action Plan.²⁵³ The country recognizes both its potential for the development of irrigation and hydro-electric power and the constraint in water availability to the country's sustainable socio-economic development unless adequate planning is put in place.²⁵⁴ Its policy on transboundary water resources is based on 'equitable access and use of the Nile waters through effective involvement of the Government in the Nile water issues, to secure adequate water for Uganda's needs today, and for the future.'²⁵⁵

Uganda's unique position as both upstream and downstream State places its entire territory within the Nile Basin. The country's water policy has, therefore, recognized the importance

²⁵¹ National Development Plan (2010/2011), the Republic of Uganda, April, 2010 at 317. Available at http://www.finance.go.ug/docs/NDP_April_2010-Prot.pdf, accessed on 25 January 2011.

²⁵² Id.

²⁵³ The Republic of Uganda National Water Policy, the Republic of Uganda, Ministry of Water, Lands and Environment, (1999) available at, <http://www.ruwas.co.ug/reports/National%20Water%20Policy.pdf>, accessed on 16 January 2011.

²⁵⁴ Kabanda, B., & Khangire ., P., Irrigation and hydro-power potential and water needs in Uganda-an overview, in Howell & Allan, (eds.), The Nile: sharing a scarce resource: An historical and technical review of water management and of economical and legal issues, Cambridge University Press, (1996) at 225.

²⁵⁵ Uganda National Water Policy, *supra* note 253, at Article 1.2 (g).

of transboundary water agreement for addressing water demands against available resource vis-à-vis the detrimental effect on its equitable entitlement.²⁵⁶ The policy tries to address the above issue by promoting an international agenda and regional obligations.²⁵⁷ In terms of an international agenda, the policy takes in to account a number of international resolutions, declarations, conventions, and guidelines for the improvement of the water sector.²⁵⁸ Good neighbourliness and the promotion of regional cooperation on optimum utilization conform to the principles of international law on the use of shared water resources.²⁵⁹

3.5.2 The 1995 Water Statute

The 1995 Water Statute is core legislation for the promotion of the rational management and use of water.²⁶⁰ The objectives of the Statute are:

- (a) To promote the rational management and use of the waters of Uganda through,
 - (i) The progressive introduction and application of appropriate standards and techniques for the investigation, use, control, protection, management and administration of water resources;
 - (ii) The co-ordination of all public and private activities which may influence the quality, quantity, distribution, use or management of water resources;
 - (iii) The co-ordination, allocation and delegation of responsibilities among Ministers and public authorities for the investigation, use, control, protection, management or administration of water resources;
- (b) To promote the provision of a clean, safe and sufficient supply of water for domestic purposes to all persons;
- (c) To allow for the orderly development and use of water resources for purposes other than domestic use, such as, the watering of stock, irrigation and agriculture, industrial,

²⁵⁶ Id., Article 2.1., 3.2.

²⁵⁷ Id.

²⁵⁸ Id.

²⁵⁹ Id.

²⁶⁰ See Section 4(a-b), the Water Statute, Statute Supplement No.7, Uganda Gazette No.56, Vol. LXXXVIII, 22nd December 1995.

commercial and mining uses, the generation of hydroelectric or geothermal energy, navigation, fishing, preservation of flora and fauna and recreation in ways which minimise harmful effects to the environment; and?

- (d) To control pollution and to promote the safe storage, treatment, discharge and disposal of waste which may pollute water or otherwise harm the environment and human health.²⁶¹

Many of the provisions assessed in the water policy can facilitate the implementation of international commitments under the CFA.

3.5.3 The 1997 Water Act

The Water Act was legislated in order to provide for the use and management of water resources, the establishment of water and sewerage authorities, and facilitates the devolution of authority for water supply and sewerage services.²⁶² The Water Act introduces general rules regarding temporary water rights to an occupier or a resident on any land to use the water for domestic use and subsistence irrigation, where there is a natural source of water.²⁶³ Furthermore, in addition to having the right to use any water under the land occupied by him on whom he is resident, one also has a right over water on adjacent land.²⁶⁴ The Water Act reflects the riparian rights doctrine; although such rights may be restricted by the Ministry of Water in its capacity to determine the geographical area for the extraction of water. The Ministry can also determine the manner in which water may be used or can determine the purpose of its use or may refuse the application of water permit, or cancel that which has been already issued.²⁶⁵ The Minister on the advice of the Water Policy Committee may also declare any part of Uganda to be a controlled area and establish a comprehensive and integrated plan for the management of land, water and other natural resources. The minister

²⁶¹ Id., Article 4.

²⁶² The Water Act, Cap. 152. The Water Act, Commencement: 7 April, 1997, Article 3-4. Available at http://www.ulii.org/ug/legis/consol_act/wa199783/, accessed on 16 January 2011.

²⁶³ Id., Article 7 (1) (b).

²⁶⁴ Id., Article 7 (2).

²⁶⁵ Id., Article 8 (1), (3-iii), (d-e).

may also temporarily or permanently prohibit the use of water from a given source on health grounds; or require any person to take measures in order to avoid, reduce or repair damage to a source of water.²⁶⁶

The above mandates explicitly showed that proper permit system under the Ugandan law may support the implementation of a number of provisions of the CFA.

3.5.4 Execution of international obligations

According to Article 123(1), treaties, conventions, agreements or other arrangements between Uganda and any other country or between Uganda or any international organization or body, in respect of any matter may be made by the President or a person authorized by the President.²⁶⁷ The enactment of laws by Parliament is required for the ratification and incorporation of treaties into domestic laws.²⁶⁸

3.6 A Comparative Analysis of the Ethiopian and Ugandan Legal Systems

The Ethiopian and Ugandan legal systems adopt similar laws with regard to the role of State in controlling natural resources; albeit the difference in the degree of control. In Uganda, the State acts as a the guarantor of the people's interests in the administration of the natural resources under the constitution, while allowing private ownership of land and the involvement in water resources development.²⁶⁹ In the Ethiopian case, the State holds absolute control of the resources, with no private ownership of land and private administration in the water sector. Thus, the degree of ownership determines the role of State in decision making over water policies and laws in the country. Thus, there are more favourable conditions in Uganda for the role and involvement of stakeholders in the process of development of water resources than in Ethiopia.

²⁶⁶ Id.

²⁶⁷ Id., Article 123(1).

²⁶⁸ Id., Article 123(2).

²⁶⁹ Id.

Ethiopia adopts a Federal system of government, where the administration of natural resources devolves to Federal States, with the exception of cases concerning transboundary water resources. Uganda on the other hand is a unitary State, adopting a more centralized approach in water administration. The different constitutional systems mean that it can have different impacts on the administration of water resources in each country. The similarity between the two constitutions is that, the State plays a vital role in the administration of natural resources, including water resources, with different levels of authority.

In both Uganda and Ethiopia the judiciary is vested with powers to interpret the law; although Courts in Ethiopia have no significant power to interpret constitutional matters. In both countries, the power of the legislature is critical in monitoring the performance of the executive in the implementation of international obligations under the CFA.

3.7 The principle of equitable and reasonable utilization and no-significant harm under the Ethiopian and Ugandan national laws

The principle of equitable and reasonable utilization under Article 4 (1) of the CFA provides:

‘Nile Basin States shall in their respective territories utilize the water resources of the Nile River System in an equitable and reasonable manner. In particular, those water resources shall be used and developed by Nile Basin States with a view to attaining optimal and sustainable utilization thereof and benefits therefrom, taking into account the interests of the Basin States concerned, consistent with adequate protection of those water resources. Each Basin State is entitled to an equitable and reasonable share in the beneficial uses of the water resources of the Nile River System.’²⁷⁰

The possibility of reducing transboundary water conflicts is primarily a political issue expressed through national policies and legislation suitable for the implementation of state obligations such as equitable and reasonable use under regional treaties.²⁷¹ The substantive

²⁷⁰ CFA, *supra* note 45.

²⁷¹ Heyns, P., et al, ‘Transboundary Water Resource Management in South Africa: Meeting the Challenge of Joint Planning and Management in the Orange River Basin’, 24 Int’l J. W.R. Devt., (2008) at 372-373.

rule of equitable and reasonable utilization, which is at the forefront of internationally accepted basic water law principles, has never been distant to state practice as its notion transcended public policy criteria and is built in to national policies and projects.²⁷² The principle sets the right to utilize by riparian state of transboundary water in its territory, without denying the right of others to similar use or cause harm.²⁷³

National policies and laws relating to transboundary water resources may reflect competing interests between upstream states and downstream states; where upstream states may favour the precedence of the principle of equitable and reasonable use principle, while downstream laws may tend to highlight the principle of no-significant harm rule.²⁷⁴ Although compromising positions may be difficult to discern within the national laws; the connection of with the two core principles of equitable and reasonable utilization is evident from the national legal framework in Ethiopia and Uganda. This section examines the principle of equitable and reasonable utilization and no-significant harm under the Ethiopian and Ugandan national laws in order to determine to what extent they support or hinder the implementation of the two principles.

3.7.1 National policy and legal considerations

The right to equitable and reasonable utilization by a riparian state puts a limit to the extent of use of water in order to prevent the dispossession of other Basin State(s) of the same right.²⁷⁵

Analysing the Ethiopian and Ugandan national laws and regulation can offer insight on the domestic context of supportive rules regarding CFA provisions on the principle of equitable and reasonable utilization.

²⁷² Utton, E., 'In Search of an Integrated Principle for Interstate Water Law: Regulation versus the Market Place', 25 Nat. Resources J., 984 (1985).

²⁷³ Kaya, I., 'Equitable Utilization: The Law of the Non-Navigational Uses of International Watercourses', Ashgate Publishing Limited, (2003) at 29.

²⁷⁴ Salman, M.A. Salman & Uprety, 'Conflict and Cooperation on South Asia's International Rivers', Kluwer Law International, London, (2002), at 25-26.

²⁷⁵ Id.

i) **The right to equitable entitlement**

The right to utilize international watercourse within a State's territory is part and parcel of inherent people's right to sustainable development as defined under the Ethiopian Constitution. The constitution, provides, 'all international agreements and relations concluded, established or conducted by the State shall protect and ensure Ethiopia's right to sustainable development.'²⁷⁶ Specific policy principles under the Ethiopian Water Resources Management Policy is also to 'ascertain and promote Ethiopia's entitlement and use of transboundary waters based on those accepted international norms and conventions endorsed by Ethiopia.'²⁷⁷ In Uganda, the key policy directive on transboundary water is to promote 'equitable access and use of the Nile water through effective involvement of the Government in the Nile waters issues, to secure adequate water for Uganda's needs for today, and for the future.'²⁷⁸

The Ethiopian Water Resources Management Policy recognize water as a scarce and vital socio-economic resource and seeks strategic planning based on long term visions and sustainable objectives; a notion that can be useful to look at cooperation around CFA principles governing the Nile waters.²⁷⁹ The policy aims to enhance and encourage water allocation based on efficient use, greater economic and social benefits.²⁸⁰ This includes, ensuring basin-wide, sub-basin and a national compatibility and integration with other natural resources.²⁸¹ Other laws, in particular, the Ethiopian Water Resources Management

²⁷⁶ Ethiopian Federal Constitution, supra note 62, Art 43(3).

²⁷⁷ Ethiopian Water Resources Management Policy, supra note 229 at 2.2.8 (3).

²⁷⁸ Key Policy Directives, A National Water Policy, The Ministry of Water, Land and Environment, the Republic of Uganda, (1999), 1.2 (g).

²⁷⁹ Ethiopian Water Resources Management Policy, supra note 229 at 3.

²⁸⁰ Id. at 6.

²⁸¹ Id., Para. 2.1.1 at 3.

Proclamation strengthensuch approach by adopting the use and allocation of water for the highest social and economic benefit.²⁸²

Similar to the Ethiopian policy and law, Ugandan national laws promote efficient, rational, optimal and sustainable use of water allocation in the country.²⁸³ By promoting a new integrated water management approach the policy recognizes the social value of water, while giving similar attention to its economic value.²⁸⁴ Therefore, Ugandan water allocation and investment on water schemes aim at achieving maximum net current and future benefits.²⁸⁵

Therefore, the principle of equitable utilization as an inherent right of sovereign States over the use of shared water basin within national boundaries is amply supportedby therespective nationalconstitutions and policies in Ethiopia and Uganda.

ii) Ethiopian and Ugandan laws supporting optimaluses

The meaning of ‘optimal use’ can be related to the highest economic use or the attainment of maximum use.²⁸⁶According to the ILC Commentary, attaining optimal utilization and benefits ‘does not mean achieving the ‘maximum’ use, the most technologically efficient use, or the most monetarily valuable use, much less short-term gain at the cost of long-term loss. Nor does it imply that the State capable of making the most efficient use of a watercourse, whether economically, in terms of avoiding waste, or in any other sense should have a superior claim to the use thereof. Rather, it implies attaining maximum possible benefits for all watercourse States and achieving the greatest possible satisfaction of all their needs, while minimizing the detriment to, or unmet needs of each.’²⁸⁷

²⁸²Ethiopian Water Resources Management Proclamation, supra note 242, Article 3.

²⁸³ Uganda National Water Policy, supra note 253, Article 11.

²⁸⁴ Id.

²⁸⁵ Id.

²⁸⁶See ILC Commentary; supra note 50, para.3 at 97.

²⁸⁷ Id.

The national policies and laws in Ethiopia and Uganda reflect optimal and beneficial utilization of their water resources within the meaning of the equitable utilization under the CFA. As important constituents of equitable and reasonable utilization of transboundary water, the two terms, optimal and beneficial uses are also essential components of the domestic water law.

Beneficial use can be achieved through planning an integrated water resources development, incorporating ‘environmental, economic and social considerations based on the principle of sustainability.’²⁸⁸ In a transboundary context, optimal utilization, therefore, must take ‘into account the interests of the Basin States concerned consistent with adequate protection of those water resources.’²⁸⁹ The meaning of ‘adequate protection’ requires national measures based on integrated management. For instance, the overall goal of national water resources management policy of Ethiopia is:

‘to enhance and promote all national efforts towards the efficient, equitable, and optimum utilization of the available water resources of Ethiopia for significant socio-economic development on sustainable basis.’²⁹⁰

Equitable measures include, ‘allocation and apportionment of water resources based on a comprehensive and integrated plans and optimum allocation principles, which can incorporate efficiency of use, equity of access, and sustainability of the resource.’²⁹¹ Policy measures supporting optimal and sustainable beneficial use within the meaning of equitable utilization can be attained through efficient allocation, redistribution, transfer, storage, and efficient use of water resources.²⁹²

²⁸⁸ Id.,

²⁸⁹ CFA, *supra* note 45, Article at 4 (1).

²⁹⁰ Ethiopian Water Management Policy, *supra* note 229 at 5.

²⁹¹ Id.

²⁹² Id.

The Ugandan water policy and water regulation provide similar goals and objectives in support of attaining optimal, sustainable and beneficial use, with due regard to adequate protection as stated in the CFA. Uganda's Constitutional and legislative frameworks confirm the necessity of balanced and equitable utilization and development through the adoption of integrated planning approach.²⁹³ In addition, constitutional provision on the management of the utilization of natural resources for sustainable development and environmental needs of present and future generations are supportive and can be linked to the meaning of CFA's equitable utilization.²⁹⁴ Moreover, by stressing on balancing equity within and between generations the policy directive strengthens optimum use where short term economic gain are outweighed by long term social and environmental costs.²⁹⁵

Ugandan laws also promote controlling pollution of water resources and the gathering and maintenance of reliable water resources information and data bases. These activities can be registered as important measures supporting optimum and sustainable use with adequate protection for the waters of the Nile under the principle of equitable and reasonable utilization in the CFA.²⁹⁶

National laws supporting the application of equitable utilization and factors and circumstances, with a view to consultations and cooperation under the CFA can be gathered from the principle of the Ethiopian Water Resources Management Policy, which recognized, 'the establishment of integrated framework for joint utilization and equitable cooperation and agreements on transboundary waters.'²⁹⁷ One of the supportive policy principles for the implementation of the CFA's equitable utilization demands, 'fostering meaningful and mutually fair regional cooperation and agreements on the joint and efficient use of

²⁹³ Constitution of the Republic of Uganda, *supra* note 215, Article XII.

²⁹⁴ *Id.*, Article XXVII,

²⁹⁵ Uganda National Water Policy, *supra* note 253 at 1.3

²⁹⁶ *Id.*, 1.1 (j and k)

²⁹⁷ Ethiopian Water Management Policy, *supra* note 229 at 2.2.8 (2).

transboundary waters with riparian countries based on ‘equitable and reasonable use’ principles.²⁹⁸ The policy statement requires compliance ‘with those international covenants adopted by Ethiopia and manage transboundary waters accordingly.’²⁹⁹

In Uganda the basic policy framework on equitable participation provides:

‘Based on the Government’s overall policy of good neighbourliness and promotion of regional cooperation for optimal resource use, Uganda’s policy principles in the regional context adhere to the various currently accepted principles of international law on the use of shared water resources.’³⁰⁰

However, while recognizing promoting fair regional cooperation on efficient use of transboundary waters with other riparian countries, some of the policy principles under Ethiopian Water Sector Strategy, accord priority to the development and implementation of unilateral projects.³⁰¹ However, the emphasis on unilateral development cannot not be considered as impeding the implementation of CFA’s commitments on equitable and reasonable use or no-harm principles; but a desire to attain food security in a country longing to develop its huge hydropower and irrigation potential.³⁰²

The controversial issue of water allocation in the Nile is a question of implementation of equitable utilization. It requires legislative framework for such implementation and shall also take in to account guidelines and procedures for evaluating the relevant factors and circumstances under the CFA.³⁰³

²⁹⁸ Id., 2.2.8 (3).

²⁹⁹ Id., at 2.2.8(4).

³⁰⁰ Uganda National Water Policy, *supra* note 253 at 3.2.

³⁰¹ Ethiopian Water Sector Strategy, *supra* note 237 at 19.

³⁰² Bekele et al, ‘Water Resources and Irrigation Development in Ethiopia’, IWMMI, 2007 at xi. Available at http://www.iwmi.cgiar.org/Publications/Working_Papers/working/WP123.pdf, accessed on 26 June 2013.

³⁰³ Article 4; paragraph 2 provides: ‘In ensuring that their utilization of Nile River System water resources is equitable and reasonable, Nile Basin States shall take into account all relevant factors and circumstances, including but not limited to the following’:

Geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character; social and economic needs of the Basin States concerned; population dependent on the water resources in each Basin State; effects of the use or uses of the water resources in one Basin State on other Basin States; existing and potential

The Ethiopian Water Resources Management Policy recognizes basic minimum requirement or basic human and livestock needs, as well as environment reserve as a priority in water allocation plan a requirement in line with the CFA water allocation demands.³⁰⁴

Similar to the case in Ethiopia, water allocation criteria in Uganda gives priority to domestic water demand. In addressing equitable utilization within the CFA, Uganda's approach recommends water allocation for the domestic needs of a community should be reserved within the total available water from each water resource.³⁰⁵ Provision for the conservation of the environment, water for production and market based allocation for practical use of the principle of 'water as social and economic good' have been identified as additional water allocation principles under the Ugandan national laws.³⁰⁶

There is no question that the above principles and objectives under Ethiopia and Ugandan laws and policies facilitate the implementation of commitments of the principle of equitable utilization under the CFA. However, there are two preconditions to synergize the support of the national laws for the CFA in this regard. Firstly, the realization of factors and circumstances under CFA require 'rules and procedures to be established by the Nile River Basin Commission for the effective implementation of equitable and reasonable utilization based on the promotion of an integrated framework for joint utilization and equitable cooperation and agreements on transboundary waters'.³⁰⁷

The NRBC's mandate to review and analyse the relevant factors under the CFA and develop a Decision Support System (DSS) includes assessment of inherent water availability in each

uses of the water resources; conservation, protection, development and economy of use of the water resources and the costs of measures taken to that effect; the availability of alternatives, of comparable value, to a particular planned or use; the contribution of each basin State to the waters of the Nile River System; the extent and proportion of the drainage area in the territory of each Basin State.

³⁰⁴ Ethiopian Water Resources Management Policy, *supra* note 229, para. 2.2.1, at 6.

³⁰⁵ Uganda National Water Policy, *supra* note 215, Article 8.1(i).

³⁰⁶ *Id.*, Articles 8.1(ii-iv).

³⁰⁷ CFA, *supra* note 45, Article 4(6).

country must be supported by national laws and institutions.³⁰⁸ In this regard the harmonization of national laws with the procedures to be developed by the NRBC is important for establishing a coherent implementation with of equitable utilization. According to under Article 4(5),

‘Nile Basin States shall, in their respective territories, according to their national laws and regulations, keep the status of their water utilization under review in light of substantial changes in relevant factors and circumstances.’³⁰⁹

Factors and circumstances on equitable water allocation can be realized with the help of national information on a number of key indicators. For instance, the Ethiopia River Basin Councils and Authorities Proclamation set key indicators for national basin information system that can be aligned to the CFA factors and circumstances. Some of these key indicators are water quality and quantity, aquatic ecosystem, water demand, existing and planned measures, impact on water resources, existing use, and stakeholders in the basin.³¹⁰

3.8 The Permit Systems and the extent to which they reflected the obligations set out in the CFA

Permit systems regulated by statutory rules in many jurisdictions determine water allocation and the priority of water use rights. In most cases, permit systems operating within the ambit of national water policies or river basin master plan studies take in to account water availability, pollution and environmental considerations. The system creates agencies with powers to limit water use rights to certain sites, amount and period. The mandates may include adjudication of disputes, approval of transfers, and cancellation of unused or misused permits.

³⁰⁸ Nile River Basin Cooperative Framework Project (D3), Final Report, Panel of Experts, Report 1.7-March 2000, at 42. (Copy with the author).

³⁰⁹ Id., Article 4(5).

³¹⁰ River Basin Councils and Authorities, Proclamation No. 534/2007, Federal Nagarit Gazeta of the Federal Democratic Republic of Ethiopia, 13th Year No.40, Addis Ababa, 23 July 2007, Article 16(2,a-g).

An analysis of permit systems in Ethiopia and Uganda under-pinning the CFA obligations may not be easy, because not only the introduction of the permit systems is a recent phenomenon in both countries, but also the statutes provide set no specific rules pertaining to transboundary water resources. Moreover, the lack of institutional capacity and coordination among different agencies make the implementation of proper permit system more difficult and practical examples hard to find. However, systematic examination of existing permit systems in Ethiopia and Uganda can still offer insights in to the extent of support for the implementation of basic principles of international law.

3.8.1 Permit system under Ethiopian law

The Ethiopian Water Resources Management Proclamation provides: ‘the management of the water resources of Ethiopia shall be in accordance with a permit system.’³¹¹ The adoption of ‘permit system’ is to support the realization of the purpose of the Ethiopian Water Resources Management Proclamation; which is: ‘to ensure that the water resources of the country are protected and utilized for the highest social and economic benefits of the people of Ethiopia, to follow up and supervise that they are duly conserved, ensure that harmful effects of water are prevented, and that the management of water resources is carried out properly.’³¹²

The points of reference in granting water use permit under Ethiopian water law are the Ethiopian water resources management policy; the master plan studies and legislative framework.³¹³ The scope of application of water use permit includes all types of water resources, including transboundary water resources. Accordingly, Article 4 of the Ethiopian water resources management proclamation provides: ‘this proclamation shall apply with respect to water resources management on the water resources that exist in

³¹¹ Ethiopian Water Resources Management Proclamation, *supra* note 242, Article 6(4).

³¹² *Id.*, Article 3.

³¹³ *Id.*, Article 6 (1-2).

Ethiopia.³¹⁴ ‘Water use’ is defined as ‘the use of water for drinking, irrigation, industry, power generation, transport, animal husbandry, fishing, mining and uses of water for other purposes.’³¹⁵

The law identifies two types of permits; namely, a permit and certificate of professional competence and a permit for water use and discharge or release of polluted water into water resources.³¹⁶ The permit for water use allocation and apportionment under the national water policy principle states that the permit ‘shall not be made on permanent basis, but rather on agreed time horizon that fits best with the socio-economic development plans, especially pertinent to water resources, subjected to appraisal and revisions in light of new developments.’³¹⁷

No detailed criteria has been set, which could be used in the allocation and management of consumptive and non-consumptive water use rights vis-à-vis the permit system under existing Ethiopian laws. However, some general policy or few statute provisions indicating different criteria for water use allocation can be gathered from water policy and proclamations.

The general water resources management policy objectives provide: ‘allocation and apportionment of water based on comprehensive and integrated plans and optimum allocation principles that incorporate efficiency of use, equity of access, and sustainability of the resource.’³¹⁸

The Ethiopian Water Resources Management Policy requires the following principles of water allocation criteria in to consideration:

³¹⁴ Id., Article 4.

³¹⁵ Ethiopian Water Resources Management Regulation No. 1151/2005, Nagarit Gazeta, 11th Year No.27, Addis Ababa, 29th March, 2005, Article 2(6).

³¹⁶ Ethiopian Water Resources Management Proclamation, supra note 242, Article 11.

³¹⁷ Ethiopian Water Resources Management Policy, supra note 229, 2.2 (2.2.1) (5), at 6.

³¹⁸ Id., 1.2 (2), at 1.

1. Recognize that the basic minimum requirement, as the reserve (basic human and livestock needs, as well as environment reserve) has the highest priority in any water allocation plan.
2. Ensure that water allocation gives highest priority to water supply and sanitation while apportioning the rest for uses and users that result in highest socio-economic benefits.
3. Enhance and encourage water allocation that is based on efficient use of water resources that harmonizes greater economic and social benefits.
4. Ensure that water allocation shall be based on the basin, sub-basin and other hydrological boundaries and take into consideration the needs of drought prone areas.
5. Adopt the principle that water allocation shall not be made on permanent basis, but rather on an agreed time horizon that fits best with the socioeconomic development plans, especially pertinent to water resources, subjected to appraisals and revisions in light of new developments.³¹⁹

Under the Ethiopian Water Resources Management Policy, water use permit for drinking, irrigation, industry, power generation, transport, animal husbandry, fishing, mining and uses of water for other purposes must all take in to account the above water allocation principles.³²⁰ The A typical permit application format contains the following information;

- a. the name and permanent address of the applicant;
- b. the location of the water resources and the intended place of use;
- c. the intended use of the water resources;
- d. the volume of water required monthly and annually;
- e. the intended method and manner of use of the water resources;
- f. where appropriate, investment certificate;
- g. feasibility studies and maps reasonably required by the Supervising Body.³²¹

However, the main criterion for water use permit is the existing water balance in the location of the water resources, which requires data and information in the location; usually unavailable, due to the lack of capacity. Conducting the inventory and registry of water

³¹⁹ Id., 2.2.1.

³²⁰ Ethiopian Water Resources Management Regulation; supra note 314, Article 2 (6).

³²¹ Id., Article 3.

resources is set by the law as one of the important activities for keeping track of water allocated on water use and discharge of waste water. Accordingly, the law instructs the Supervising body, which is responsible for ensuing water resources available for beneficial uses, to prepare and maintain the inventory of water resources of the country.³²² In particular, it shall carry out the identification of availability, location, amount and quality of water resources at any significant point in time.³²³ In addition, it shall identify seasonally expected demands for the supply of water and compile periodic data on consumptive and non-consumptive use of water.³²⁴

The law defines 'waste' as 'any harmful matter introduced, released or discharged into any water body in any solid, liquid or gaseous form.'³²⁵ The most important criteria in deciding whether to grant or refuse a permit for the discharge of treated waste water into water resources is the consideration of effluent and stream standards.³²⁶ The environmental criteria pertaining to granting permits for water use and waste discharge is as per the provisions of Environmental Impact Assessment (EIA) Proclamation.³²⁷ Therefore a permit terminated if there is 'a finding that the usage of the water resources causes a negative impact on the environment as per the provisions of Environmental Impact Assessment Proclamation.'³²⁸ Thus, it is mandatory for a proponent to 'carry out the environmental impact assessment of a project that is likely to produce a trans-regional impact in consultation with the communities likely to be affected...'³²⁹

³²² Ethiopian Water Resources Management Proclamation, *supra* note 242, Article 10(1).

³²³ *Id.*, Article 10 (1) (a).

³²⁴ *Id.*, Article 10 (1) (a-b).

³²⁵ *Id.*, Article 2(10).

³²⁶ Ethiopian Water Resources Management Regulation; *supra* note 314, Article 11(2).

³²⁷ *Id.*, Article 6 (3) (e).

³²⁸ *Id.*

³²⁹ Environmental Impact Assessment Proclamation No. 299/2002, *Negarit Gazeta*, 9th Year, No. 11, Addis Ababa, 3rd December 2002, Article 6(1).

In making the decision on whether to grant or refuse a permit for wastewater discharge, the provisions of Ethiopian Environmental Pollution Control Proclamation³³⁰ are also to be taken into consideration.

3.8.2 Grounds for the termination and variation of a water use permit

The Ethiopian Water Resources Management Proclamation provides ‘the Supervising body may, at any time, suspend or revoke a permit in whole or partially where the holder fails to observe or fulfil his/her obligations.’³³¹ Details for the implementation of this provision are provided under the Ethiopian Water Resources Management Regulation. Accordingly, a permit may be suspended in whole or in part for the following reasons:

- a) a failure to comply with the terms and conditions prescribed in the permit;
- (b) a use of water for purposes not authorized;
- (c) a failure to pay the required water charges within sixty (60) days following a written notification;
- (d) a finding by the Supervising Body that the water resources involved is being temporarily depleted;
- (e) a failure to keep a water quality standard.³³²

Therefore, the above criteria sets water availability, water quality and environmental impact as a standard for the termination and variation of a water use permit.

³³⁰ See Environmental Pollution Control Proclamation No. 300/2002, Negarit Gazeta 9th Year No. 12, Addis Ababa, 2002.

³³¹ Ethiopian Water Resources Management Proclamation, *supra* note 242, Article 17.

³³² Ethiopian Water Resources Management Regulation; *supra* note 314, Article 6 (2) (a-e).

3.8.3 Institutional aspect: the supervising body

The Federal ministry of Water, Irrigation and Energy is the Supervising body responsible for issuing permits.³³³ The Ministry may, where necessary, delegate its powers and duties to the appropriate body for efficient execution.³³⁴ In addition to the central Ministry, the river basin organizations (RBOs) are given the power to issue permits within their respective basins.³³⁵ It is to be assumed that the Ministry has the power to issue permits within those basins where RBOs are established. To date, out of existing twelve river basins in the country, only three RBOs; the Abbay, the Awash and the Rift Valley have been established.

The power given to the RBOs may raise a practical question with regard to the Ministry's mandate with regard to those regional States with river basin organizations. The issue of delegation of mandates is, therefore, one of the important areas requiring clarity in the permit system. There is no directive identifying the conditions for delegating the Ministry's mandate, although the current practice shows delegating or withdrawing by writing a letter.

The above examination of the Ethiopian permit system shows that there are still some gaps, which require a revision of the permit system in Ethiopia. Among areas requiring attention is, establish procedures for ascertaining water balance and water allocation. Moreover, the issue of insufficient information from the local area, where permits are requested and the lack of coordination among different sectors (Ministry of Agriculture licencing agricultural investments; the Ministry of Industry; Ministry of Mines) licencing permit related activities require proper consideration.

³³³ Ministry of Water and Energy, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, A Proclamation No. 691/2010, A Proclamation to Provide for the Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia, Addis Ababa, (2010).

³³⁴ Id.

³³⁵ *River Basin Councils and Authorities Proclamation*, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, Proclamation No. 534/2007.

The other important area is the delegation of EIA to the sectoral agencies by the Environmental Protection Authority (EPA). The EPA's involvement as overall supervisory authority is compromised and created a vacuum on the responsibility for monitoring the implementation of an EIA within the context of the permit system.

3.8.4 The permit system and the CFA

Whether the permit system reflects the obligations set out in the CFA can be examined in relation to the analysis of CFA international obligations vis-à-vis the provisions of the national laws. The Ethiopian Water Sector Strategy provides for the assessment and update every 3 years the state of water affairs of transboundary rivers,³³⁶ which includes the determination of availability of water and sediment volume of each trans-boundary river on a regular basis.³³⁷ The information provided under this provision can be used as an input in determining the granting, revoking or varying of the permit on the use of transboundary rivers. A typical condition for water use permit can be gathered from periodic assessment of the demand for water development projects in each of the trans-boundary rivers with particular emphasis on high priority projects.

With regard to water use the above national provision can support the CFA obligation requiring Nile Basin States to 'keep the status of their water utilization in their respective territories under review in light of substantial changes in relevant factors and circumstances and in accordance with their national laws and regulations.'³³⁸ This review can

³³⁶ Ethiopian Water Sector Strategy, *supra* note 237, 4.1.4 (2) at 19.

³³⁷ *Id.*, 4.1.4 (2) (a-d) at 19-20.

³³⁸ *Id.*, 4.1.4 (3).

be supported and advanced under the Ethiopian permit system using the criteria for granting and varying existing permits with regard to transboundary water use.

The water permit criteria with regard to consumptive and non-consumptive rights on account of waste water discharge and environmental conditions can also advance the implementation of the principles of ‘causing no-significant harm’ and conservation and preservation of ecosystem obligations under the CFA. The restrictions of water use permits due to an increase in the demand for water; the adjustment of allocation; the temporary or permanent depletion of water resources; and negative impact on the environment stated under the Ethiopian water permit system can all facilitate the implementation of the CFA provisions. However, the existing permit system still requires proper update and harmonization with the CFA obligations, in order to fill some of the existing gaps; in particular, the lack of detailed procedures for its implementation, proper water allocation criteria, and the need for specific provisions on transboundary water. The issue of clarity regarding institutional mandates among different bodies, namely, the Ministry of Water, RBOS and regional states must also be addressed and proper mechanism for coordination among different sectors must be developed.

3.8.5 Permit system under Ugandan law

The 1995 Water statute provides, ‘A person wishing to construct any works or to take and use water may apply to the Director in the prescribed form for a permit to do so.’³³⁹ The conditions required of a permit holder with regard to uses of water are, therefore, that ‘no person shall construct or operate any works unless authorised to do so under ... the Statute.’³⁴⁰

³³⁹ Ugandan Water Statute, *supra* note 260, Article 18 (2).

³⁴⁰ *Id.*, Article 18(1).

Applications for a permit of construction works or the use water may be made to the Director of Water, which shall, on receipt of an application give public notice of the application.³⁴¹ A permit is granted on the condition that the way in which land where water is used under the water permit is to be drained and the person to whom the permit is granted has to make compensation to any other person as a result of any harm caused.³⁴²

Among the standard conditions with regard to the permit for waste discharge is the requirement not causing pollution or allowing any water to be polluted.³⁴³ Preventing damage to the source from which the water is taken, or to which water is discharged after use is also one of the important conditions for maintaining a permit for waste water discharge.³⁴⁴ In this regard, the law requires a permit holder to take precautions to ensure that no activities on the land where water is used results in the accumulation of any substance which may render water less fit for the purpose for which it may be reasonably used.³⁴⁵ The above precautionary measure can be considered as a progressive criterion for avoiding pollution and decreasing the chance of revocation of permits.

The considerations for revision, variation or cancellation of water permits may depend on the result of water availability in the area. Accordingly, where the water is or is likely to become insufficient in quantity or quality for the needs of the persons using or seeking to use it from that source, a water permit for that area may be suspended or varied.³⁴⁶ The law also requires that the holder of a water permit make full beneficial use of the permit within two preceding

³⁴¹ Id., Article 18 (3).

³⁴² Id., 18 (4) (b).

³⁴³ Id., Article 18.

³⁴⁴ Id.

³⁴⁵ Id., Article 20.

³⁴⁶ Id., Article 22(1).

years.³⁴⁷ Although, what constitutes ‘beneficial use’ has not been elaborated under the statute, the benefit may be construed to mean economic or environmental benefit, or both.

Granting, revoking or varying water use or water discharge permit vis-à-vis environmental requirements is related to the EIA regulation and other environmental laws in Uganda. The EIA regulation provides: ‘a licensing authority under any law in force in Uganda, shall require the production of a certificate of approval of environmental impact assessment before issuing a licence for any project identified in accordance with...this regulation.’³⁴⁸

The institutional structure essential for the implementation of the permit system is primarily the responsibility of the Minister responsible for water or natural resources. However, the Minister may delegate its power to the Director of Water Development including ‘an officer, servant or agent of an authority or any person acting on behalf of the authority.’³⁴⁹

Finally, the Ugandan permit system contains important criteria for the granting, revoking or varying permit. The criteria for water use and waste water discharge involve water availability and environmental impact assessment as an overarching criterion.

The Ugandan permit system lacks detailed provisions determining the criteria for the granting, suspending or varying water use permit. Compared to its Ethiopian counterpart, the Ugandan system needs additional detailed provisions supporting the implementation of international commitments. However, its relevance to the implementation of the CFA’s basic obligations can still be examined in order to determine the extent of its support to the CFA.

³⁴⁷ Id., Article 25 (e).

³⁴⁸ Article 3(3), The Environmental Impact Assessment Regulation, S.I. No. 13/1998. Statutory instruments, 1998 No. 13.

³⁴⁹ Ugandan Water Statute, supra note 260, Article 11.

3.8.6 Relevance to the CFA obligations

The first important gap in this analysis is that the permit systems in both countries fail to separate water between transboundary and non-transboundary water resources. The analysis of Ethiopian and Ugandan case studies indicates that the permit systems, which are relatively new introductions to their existing regulatory framework, do not directly address transboundary water issues. In practice, and at least for now, permits are issued only for small scale water use.³⁵⁰ An increasing investment on large scale irrigation within transboundary river basins necessitates a separate permit for transboundary water use or water discharge permits. Despite the gaps requiring legal and institutional reform, sufficient relevance can be drawn from the existing permit systems in connections with some of the CFA obligations.

The criteria for the usage of the water resources not to cause a negative impact on the environment and the requirement to implement the Provisions of Environmental Impact Assessment, both within the Ethiopian and Ugandan permit systems can support first and foremost the CFA obligation on EIA. The CFA requires, ‘for planned measures that may have significant adverse environmental impacts, Nile Basin States shall, at an early stage, undertake a comprehensive assessment of those impacts with regard to their own territories and the territories of other Nile Basin States.’³⁵¹ The Nile River Basin Commission is mandated to adopt criteria for audit measures; the CFA requires the Commission to carry out audits of measures in accordance with national legislations in conjunction with the criteria adopted under the Framework.³⁵² Therefore, the CFA recognizes the contribution of existing laws, including the permit systems in the implementation of transboundary EIA. Furthermore, provisions on waste discharge permits discussed in the case studies can support the CFA obligations with regard to the protection and conservation of the Nile River Basin and its

³⁵⁰ Interview with Director, Water Use Permit and Administration Directorate, Ministry of Water, Irrigation and Energy, Addis Ababa, Ethiopia, 13 February 2014.

³⁵¹ The CFA *supra* note 45, Article 9(1).

³⁵² *Id.*, Article 9 (5).

ecosystems.³⁵³

The cancellation or the varying of water permit on the basis of water quality can contribute to CFA's requirement of the Basin States to protect and improve water quality within the Nile River Basin.³⁵⁴ Accordingly, supportive relationship can be drawn from the above case studies from the permit systems criteria, such as water availability (quantity), quality and the EIA, in particular, to the CFA principle of no-significant harm. The CFA obligation not to cause significant harm requires, 'Nile Basin States shall, in utilizing Nile River System water resources in their territories, take all appropriate measures to prevent the causing of significant harm to other Basin States.'³⁵⁵ The relevance of water use and waste water discharge permit criteria can also be related to the CFA commitment on equitable and reasonable utilization. The CFA requires, 'Nile Basin States shall, in their respective territories, according to their national laws and regulations, keep the status of their water utilization under review in light of substantial changes in relevant factors and circumstances.'³⁵⁶ The national laws and regulations pertaining to the permit systems in Ethiopia and Uganda can offer support in the realization of such review in light of criteria on water availability and the EIA.

The relevance of existing criteria under the permit systems may also be examined within the CFA requirements regarding factors and circumstances for ensuring equitable and reasonable utilization of the Nile River System. Some of these factors and circumstances; such as, the effects of the use or uses of the water resources in one Basin State on other Basin States; existing and potential use; and conservation, protection of the water resources can be related

³⁵³ Id., Article 6.

³⁵⁴ Id., Article 6 (1) (a)

³⁵⁵ Id., Article 4 (1).

³⁵⁶ Id., Article 4 (5).

to water availability and environmental criteria under the two permit systems.³⁵⁷

The above analysis of the national permit systems in both case study countries indicate that although there are no specific international obligations incorporated in the national laws the permit systems in Ethiopia and Uganda can be the implementations of CFA obligations. However, the gaps identified must be addressed in order to establish an appropriate linkage for the realization of effective implementation.

3.9 Conclusion

The review and analysis of Ethiopian and Ugandan legal systems reveal that both countries have a long legal history. However, they adopt different constitutional systems of government; Ethiopia follows a Federal system of Government, while Uganda adopted a unitary system. Despite the some differences in the system, both recognize the right to improved living standards and sustainable development in their policies and legislation. Examination of the two constitutional provisions, national policies, and legislation indicate the existence of legal and institutional framework supporting requirement of the principle of equitable utilization under the CFA. The overall examination of the laws in the case studies indicate the national laws pertaining to the permit system can promote the principles equitable utilization and no-significant harm. However, the existence of gaps must be anticipated as multiple national laws supporting the implementation of international commitments by themselves may not provide sufficient implementation mechanism, unless compatible procedures at regional and national levels are put in place. In particular, the

³⁵⁷CFA Art. 4(2)(d-f).

development of procedures at the Basin level must take in to account the gaps at national level in order to complement each other for effective implementation.

CHAPTER 4

PROCEDURAL RULES: A CASE STUDY OF ETHIOPIAN AND UGANDAN LAWS

4.1 Introduction

Procedural rules are essential requirements for the implementation of equitable utilization of water resources.³⁵⁸ Effective implementation of procedural rules requires consultation and negotiation among co-basin States as a condition precedent to the lawful utilization of the waters of a drainage basin.³⁵⁹ In the more recent *Pulp Mills Case* procedural issues were

³⁵⁸ Schachter, Oscar, *'Sharing the World's Resources'*, Columbia University Press, (1977) at 69.

³⁵⁹ Bourne, C. B., *'Procedure in the Development of International Drainage Basins: the Duty to Consult and to Negotiate'*, 10 Can. Y.B. Int'l L. (1972) at 213.

prominent in the opinion of the ICJ³⁶⁰ which emphasised that a State may be required to answer for breach of procedural obligations.³⁶¹

The implementation of international commitments on data and information exchange and prior notification of planned measures requires supporting domestic laws and evolving regional experiences. Past and present regional experiences on data and information exchange can help to gauge national positions of the riparian states. In the Nile, hydrological data collection and publication dates back to the first half of the 20th Century, where data on river levels, discharge measurements, river flows and rainfall were gathered.³⁶²

4.2 Regional Experience

The Hydro-meteorological Survey of Lakes Victoria, Kyoga and Albert (Hydromet) was the first regional data and information exchange project³⁶³ with limited scope.³⁶⁴ Ethiopia participated as observer due to mistrust in allowing technical data collection in its territory. Moreover, it perceived the project as a means of collecting data for the use of downstream countries. It further saw it a diversionary tactic on the part of Egypt from the real issue of water allocation to the upstream States.³⁶⁵ Uganda's understanding was different from that of Ethiopia. It saw data and information exchange as helpful for planning water

³⁶⁰ Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006 I.C.J. Reports 2006, p. 133, para 68, para. 77.

³⁶¹ McIntyre, O., 'Analysis, the Proceduralisation and Growing Maturity of International Water Law: Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), International Court of Justice', 20 April 2010, 22 J. Envtl L., (2010) at 480.

³⁶² Sutcliffe, J., and Lazenby, J., Hydrological data requirements for planning Nile management, in Howell, P., & Allan, J., (eds.), 'The Nile sharing a scarce resource: An historical and technical review of water management and of economical and legal issues', Cambridge University Press, (1994) at 163, 165.

³⁶³ Okidi, O., History of the Nile and Lake Victoria Basins through Treaties, in Howell, P., & Allan, J., (eds.), 'The Nile sharing a scarce resource: An historical and technical review of water management and of economical and legal issues', Cambridge University Press, (1994) at 335.

³⁶⁴ Rabie Elemam, H. E., Egypt and Collective Action Mechanisms in the Nile Basin, in Tvedt, T., (eds.), 'The River Nile in the Post-Colonial Age: Conflict and Cooperation among the Nile Basin Countries', I.B. TAURIS, London, (2010), at 227. Waterbury, J., 'The Nile Basin: National Determinants of Collective Action', Yale University Press, (2002) at 76.

³⁶⁵ Tafesse, T., 'The Hydropolitical Perspective of the Nile Question', VIIIth Nile 2002 Conference, Addis Ababa, Ethiopia, June 26-29, 2000, at 598.

conservation, development and providing grounds for basin-wide cooperation, regulation and utilization of the Nile waters.³⁶⁶

The Technical Cooperation for the Promotion of the Development and Environmental Protection of the Nile Basin' (TECCONILE) was another regional arrangement, which had a component on data and information exchange.³⁶⁷ For countries such as Uganda, the availability of data augmented and strengthened its plan for increased power generation potential.³⁶⁸ It also allowed the country to acquire prior knowledge of any harm by upstream States that might cause significant reduction of water to Lake Victoria; Kenya, Tanzania and Rwanda.³⁶⁹

4.2.1. Experience in Data Exchange under Project D3 and the NBI

One of the components of the Nile River Basin Cooperative Framework (D3) Project was a Basin-Wide Data Component with the aim 'to assist...the process of identifying and evaluating alternatives for a cooperative framework that will lead to the equitable and legitimate use of the Nile Basin water resources.'³⁷⁰ The major areas of the initiative included, water resources data such as, water flow generated the amount of consumptive water use, future water use, and evaporation, rainfall, and water pollution on main stream and tributaries. Environmental data regarding water quantity (floods and droughts), water quality (degradation and pollution), soil erosion, desertification, endangered species, salinity, aquatic

³⁶⁶ Ahmed, S., Principles and precedents in international law governing the sharing of Nile waters, in Howell, P., & Allan, J., (eds.), *The Nile sharing a scarce resource: An historical and technical review of water management and of economical and legal issues*, Cambridge University Press, (1994) at 358.

³⁶⁷ Fahmy, A., *The Identification of Hydrological Units in the Nile Basin Data Availability*, FRIEND NILE (FN) Flanders Science trust Fund Project, The United Nation Education, Scientific and Culture Organization (UNESCO) (2006) at 53. Available at http://www.unesco.org/new/fileadmin/MULTIMEDIA/FIELD/Cairo/pdf/hydrology_study.pdf, accessed on 24 July 2011.

³⁶⁸ Kabanda, B., & Kahangire, P., *Irrigation and hydropower potential and water needs in Uganda-an overview*, in Howell, P., & Allan, J., (eds.), *The Nile sharing a scarce resource: An historical and technical review of water management and of economical and legal issues*, Cambridge University Press, (1994), 217-226.

³⁶⁹ Waterbury, J., *The Nile Basin National Determinants of Collective Action*, Yale University Press, New Haven and London, (2002) at 165.

³⁷⁰ United Nations Development Programme-Project of the Nile River Basin Countries, Project Document, (May 1997) at 19. (Copy with the author).

weeds, are also part of data gathering and exchange. In addition, economic and social data, population, socio-economic benefits of water use, land use formed a sub-component of the project initiative.³⁷¹

The main output from the work on data and information component had been compiled in National Reports and a Basin-Wide Consolidated Report for countries consideration.³⁷² While Ethiopia opted not to participate in the data component³⁷³ Uganda was at the fore front with the other seven Nile basin countries in the Data and Information Team operating under the D3 Project.³⁷⁴

4.2.2. Data and information exchange under the NBI

The NBI was established in 1999 by Agreed Minutes³⁷⁵ and the two complementary Programs, known as the Shared Vision Program (SVP) and the Subsidiary Action Program (SAP)³⁷⁶ required data and information from the Nile Basin countries, where Ethiopia and Uganda also been part of the experience. Below are some of the projects initiated by the NBI or affiliated to it.

i) Experience from the FAO-Nile Basin DSS

The Food and Agriculture Organization (FAO), was among a number of initiatives, which enabled Nile basin countries such as Uganda to participate in activities supporting the Lake

³⁷¹ Id., 19-21.

³⁷² National Reports, Nile River Basin Cooperative Framework Project (D-3), Data and Information (Technical Resources) Study Team (copy with the author). See also Nile River Basin Cooperative Framework Project (D-3); See also Consolidated Report: Data and Information (Technical Resources) Study Team, UNDP (RAB/96/024, GLO/98/155), June 1999. (Copy with the author).

³⁷³ Id.

³⁷⁴ Id. The other countries are Burundi, Egypt, Ethiopia, Kenya, Rwanda, Sudan, Tanzania, and Uganda.

³⁷⁵ *Agreed Minutes, Extraordinary Meeting of Nile Council of Ministers*, Dar es Salam, United Republic of Tanzania, 22 February 1999, available at www.nilebasin.org, accessed 24 July 2011.

³⁷⁶ See *NBI, Strategic Action Program: Policy Guidelines for the Nile River Basin Strategic Action Program, Brief*, (2001), (NBI-Secretariat). See also: *Project Appraisal Document for the SVP of the NBI, (SVP-PAD), W.B. Report No.26222. 2 (Apr. 21, 2003)*, available at www.nilebasin.org, accessed 24 February 2011.

Victoria region.³⁷⁷ The project built capacity for the establishment of a trans-boundary hydro-meteorological monitoring network; the establishment of national geo-referenced databases and spatial layers; hydro-meteorological, water use information, land use, and development of a Nile Decision Support Tool (Nile DST).³⁷⁸

A Decision Support System (DSS) ‘is a multidisciplinary tool, which may contain a number of technical/analytical components linked together within an interactive and user-friendly computer-based framework.’³⁷⁹ The main objective of the Nile Basin DSS is to ‘develop a shared knowledge base, analytical capacity, and supporting stakeholder interaction, for cooperative planning and management decision making for the Nile River Basin. An essential feature of the Nile Basin DSS is to be an agreed upon tool that will be accepted and used by riparians in the management of the shared Nile water resources’.³⁸⁰ All the Nile basin countries, including Ethiopia and Uganda are beneficiaries from the DSS repository the data and information relevant to water resources development in the Nile Basin.³⁸¹ The project experience could be beneficial in national capacity building, and thereby facilitate support for the implementation of the CFA data and information exchange.

³⁷⁷ Some pre-NBI FAO supported projects Uganda has been a party are: ‘*Monitoring, Forecasting and Simulation of the River Nile Basin for Agricultural Production*’ implemented in 1990-1991; ‘*Water Resources Management Policy and Institutions in the Lake Victoria*’, implemented in 1993-1995; ‘*Water Hyacinth Control in East Africa*’ implemented in 1993-1995; and ‘*Information System for Water Resources Monitoring and Planning in the Lake Victoria Region*’ implemented in 1995-1999. Available at <http://www.fao.org/nr/water/faonile/ProjectDocument.pdf>, accessed on 06 August 2011.

³⁷⁸ Id.

³⁷⁹ Nile Basin decision Support System (DSS), Nile Basin Initiative, Shared Vision Program, Water Resources Planning and Management Program, available at http://wrpmp.nilebasin.org/?option=com_content&task=view&id=20&Itemid=46, accessed on 07 August 2011.

³⁸⁰ Droogers, P., and Immerzeel, W., *Report Future Water 85, Preliminary Data Compilation for the Nile Basin Decision Support System: Inception Report*, (2009) at 7. (Ministry of Water and Energy, Ethiopia).

³⁸¹ Some examples of the types of information are: hydro-meteorological data series such as rainfall, flow and evaporation, land use, land cover and soils. Other information is on infrastructure such as reservoirs or irrigation schemes. See *NBI develops tool to support decision making in water resources planning and management*, Nile News, Volume 8, Issue 2, June 2011. Available at http://www.nilebasin.org/newsite/index.php?option=com_remository&Itemid=133&func=startdown&id=1&lang=en, accessed on 07 August 2011.

The Eastern Nile Subsidiary Action Programme (ENSAP) the Eastern Nile Planning Model, Flood preparedness and Early Warning, and Watershed Management all helped countries such as Ethiopia, Sudan and Egypt on data and information exchange among themselves.³⁸² In this respect, the most important project, which demanded regional data and information exchange regime, is the Joint Multi-Purpose Project in the Eastern Nile Subsidiary Action Program (ENSAP).³⁸³ The data and information exchange regime, known as ‘One-System Inventory (OSI)’ is an integrated approach with ‘no-borders perspective across the EN sub-basin and provide information base for further riparian consultation, planning and project identification.’³⁸⁴

The national data inputs consolidated overcoming fragmented and inadequate water resources related data base by facilitating activities for sufficient data and information sharing mechanisms, institutions, infrastructure at the Eastern Nile level.³⁸⁵

ii) Data and Information Sharing Protocol

Following the agreement by the Nile Council of Ministers (Nile-COM) of the Nile Basin States initiating a protocol for data sharing and information exchange a ‘Road Map for

³⁸² See Eastern Nile Subsidiary Action Program (ENSAP), *Eastern Nile Planning Model*; available at http://ensap.nilebasin.org/index.php?option=com_content&task=view&id=37&Itemid=124; and *Early Warning Flood Preparedness*, available at http://ensap.nilebasin.org/index.php?option=com_content&task=view&id=38&Itemid=125; *Watershed Management*, available at http://ensap.nilebasin.org/index.php?option=com_content&task=view&id=43&Itemid=129; accessed on 07 August 2011.

³⁸³ Eastern Nile Subsidiary Action Program, Joint Multi-purpose Program (JMP) and JMP1. Available at http://ensap.nilebasin.org/index.php?option=com_content&task=view&id=120&Itemid=167, accessed on 15 September 2011.

³⁸⁴ See Eastern Nile Subsidiary Action Program (ENSAP), One System Inventory Consultation Workshop, available at http://ensap.nilebasin.org/index.php?option=com_content&task=view&id=64&Itemid=135, accessed on 07 August 2011.

³⁸⁵ Id.

Development of Nile Basin Agreement on Data and Information Sharing and Exchange' proposed general recommendations on its development.³⁸⁶

Some of the on-going activities in the basin include the Nile Decision Support system (Nile-DSS)³⁸⁷ and tools for the Eastern Nile Planning model³⁸⁸, including, an interim guideline for data sharing and information exchange.³⁸⁹ The development of the protocol and the guideline can enhance the capacity of national laws in implementing CFA's commitments on regular data and information exchange and prior notification on planned measures.

4.3 The Requirements under the CFA

Article 7 of CFA sets the following provision with regard to regular exchange of data and information:

1. In pursuance of their cooperation concerning the use, development and protection of the Nile River Basin and its water resources, Nile Basin States shall on a regular basis exchange readily available and relevant data and information on existing measures and on the condition of water resources of the Basin, where possible in a form that facilitates its utilization by the States to which it is communicated.
2. If a Nile Basin State is requested by another Basin State to provide data or information that is not readily available, it shall employ its best efforts to comply with the request but may condition its compliance upon payment by the requesting State of the reasonable costs of collecting and, where appropriate, processing such data or information.
3. In the implementation of their obligations under Paragraph 1 and 2, Nile Basin States agree to observe procedures to be developed by the Nile River Basin Commission.

³⁸⁶ Nile Council of Ministers, *Minutes, 14th Annual Meeting of the Nile-COM*, 3-6 May 2006, Bujumbura, Burundi. (Ministry of Water and Energy, Ethiopia).; See also *Nile Basin Initiative Nile Basin Agreement on Data/Information Exchange and Sharing Possible Road Map for Development*, Draft Discussion (Water Resources Planning and Management Planning), (June 2007), at 3.

³⁸⁷ Nile Basin Initiative, Water Resources Planning and Management, Nile Basin Decision Support System, available at http://wrpmp.nilebasin.org/?option=com_content&task=view&id=20&Itemid=46, accessed on 27 July 2011.

³⁸⁸ Nile Basin Initiative, Eastern Nile Subsidiary Action Program, Eastern Nile Planning Model, available at http://ensap.nilebasin.org/index.php?Itemid=124&id=37&option=com_content&task=view, accessed on 27 July 2011.

³⁸⁹ Corporate Report, Nile Basin Initiative, (2010) at 7. (Copy with the author).

The above provision which sets general requirements for exchanging data and information between the Nile Basin States is a prerequisite for ensuring equitable and reasonable utilization between Nile water resources. Furthermore, data and information is necessary for the application of relevant factors and circumstances in the implementation of obligation on equitable reasonable utilization under Article 5 (2).³⁹⁰ The other aspect that the CFA sets forth is the exchange of ‘readily available’ data and information. The CFA does not provide on what such undertaking constitutes or how can it be effectively implemented. Existing international practice denote arrangements to be made on ‘readily available’ data, inter alia, on transboundary EIA; hydrological, meteorological, hydrogeological and ecological and water quality.³⁹¹ The national aspect of the law on exchange of available data and information may include ‘permits or regulations for water discharges issued by the competent authority or appropriate body’.³⁹² Therefore, it is expected that the Nile River Basin Commission has to prepare modalities for what shall constitute ‘readily available’ data. Furthermore, the Nile Basin countries shall undertake harmonization of their national laws in this regard.

The regular exchange of data and information is also essential ‘in order to enable co-riparians to take the appropriate individual action for the fulfilment of the due diligence obligation not to cause significant harm.’³⁹³

The exchange of data and information under the CFA is of a general character and is concerning data and information exchange on a regular basis regarding the current state of watercourse. Thus, as set out under Article 7 (1), the scope of the CFA provision covers existing measures and natural conditions of the watercourse. As result, ‘this obligation is to be considered as separate from those on the exchange of data and information concerning planned measures.’³⁹⁴

³⁹⁰ The CFA, *supra* note 45, Article 7.

³⁹¹ Declaration of Asuncion on the Use of International Rivers, adopted by the Ministers for Foreign Affairs of the River Plate Basin States (1970). See also Article 13 of the 1992 UN/ECE Helsinki Convention (Tanzi 197).

³⁹² 1992 UN/ECE Helsinki Convention, *supra* note 129.

³⁹³ Tanzi, A., & Arcari, M., ‘The United Nations Convention on the Law of international Watercourses’: Kluwer Law International, London, (2001) at 195.

³⁹⁴ *Id.*, 195

4.4 Ethiopian National Case on Regular Exchange of Data and Information

National laws and practices supporting exchange of information both in Ethiopia and Uganda can be ascertained by examining different sectoral policies and legislative instruments, as well as existing and planned national projects on rivers crossing boundaries in Ethiopia and Uganda. The Ethiopian Water Resources Management Policy (EWRMP) principles for an integrated water resources management (IWRM) can be cited as a basis for data and information requirement.³⁹⁵ The management and administration of water resources information under the EWRMP can be exercised on the basis of project, sector, and technical and public information systems and can help to develop a coherent, efficient and streamlined process of information management in the water sector as a whole and transboundary water in particular.³⁹⁶ As the guiding principle under policy seeks to define and incorporate data collection, data processing, analysis and dissemination, this can encourage the facilitation of readily available data required under the CFA.³⁹⁷

Although no specific policy principles on the issue of data and information exchange are provided under the Ethiopian transboundary waters, the policy framework for joint utilization could be interpreted as cooperation on data and information exchange.³⁹⁸ Therefore, the policy provisions can be used as supportive principles in the implementation of the CFA's regular exchange of data and information.

The Ethiopian Water Sector Strategy sets some detailed guiding principles on data gathering; assessment and update of water demand³⁹⁹; update of the state of water affairs of transboundary rivers.⁴⁰⁰ The strategy principles are in line with the CFA requirement:

³⁹⁵ *Ethiopian Water Resources Management Policy*, supra note 230 Paragraph 2.1.1 (1, 4).

³⁹⁶ *Id.*, Paragraph 2.2.4 (B.1); *Id.*, Paragraph 2.2.4 (A-1) at 11.

³⁹⁷ *Id.*

³⁹⁸ *Id.* Paragraph 2.2.8 (2) at 15.

³⁹⁹ *Id.*, Paragraph 4.1.4 (3) at 19.

⁴⁰⁰ *Ethiopian Water Sector Strategy*, supra note 238, Paragraph 4.1.4 (2) at 19.

‘Nile Basin States shall in their respective territories, according to their national laws and regulations, keep the status of their water utilization under review in light of substantial changes in relevant factors and circumstances’.⁴⁰¹

In addition to the policy principles and strategy guidelines, data and information exchange requires clear national laws establishing inventory on water resources. The Ethiopian Water Resources Management Proclamation on the inventory of water resources can be used as an integral part of the process of CFA’s implementation. The WaterResources Information Centre in the Ministryof Water and Energy maintains arrange of information on inventory on water resources, including the following:

- a) Identification and description of the occurrence, availability, location, amount and quality of water resources at any significant points in time of a year.
- b) Identification and description of seasonally expected demands for the supply of water.
- c) Periodically compiled data on consumptive and non-consumptive use of water.⁴⁰²

The national law facilitates data and information gathering by requiringall appropriate public bodies to keep an inventory and give information to the Ministry any information it may require regarding the inventory and actions with respect to the utilization of water resources in their respective region.⁴⁰³

With regard to access to the national Meta-data the assumption is that ripariancountriesmay channel their requests directly to the appropriate authorities or through the NRBC as a right to exchange of data and information under the CFA. However, such exercise requires consultations or negotiations notwithstanding the general duty to cooperate. The overall analysis of the Ethiopian laws, thus, indicates that there is more groundfor supporting the national implementation of the CFA provisions on regular exchange of data and information.

⁴⁰¹ CFA, supra note 45, Article 4(5).

⁴⁰² Federal Negarit Gazeta, of the Federal Democratic Republic of Ethiopia, Proclamation No. 197/2000, *Ethiopian Water Resources Management Proclamation*, Article 10.

⁴⁰³ Id., Article 10(3).

4.5 The Ugandan National Case Study on Regular Exchange of Data and Information

As a party to functioning bilateral treaty regimes, such as the Owen Falls Dam and the Lake Victoria Basin Commission (LVBC) Uganda's case study provides a more clearer regional and national experience on the data and information exchange.⁴⁰⁴ The 1950 Owen Falls treaty requires Uganda to provide regular meteorological and hydrological data and information to the Government of Egypt.⁴⁰⁵ An Egyptian resident engineer, which has access to all posts in Uganda conducts periodical inspections in order ensure regular data collection is undertaken in accordance with the terms of the treaty.⁴⁰⁶ However, the provision of the treaty cannot be interpreted within the requirements under the CFA, as the Owens Dam treaty's demand is an arrangement contrary to general understanding of the notion on data and information exchange. The main fallacy of the treaty provision is its failure to provide a reciprocal obligation and maintaining an exclusive advantage to existing use of Egypt at the expense of future use of Uganda. The underlying imbalance over the benefit of data and information sharing is, thus exhibited in a scenario where Egypt has been able to use its own engineers and expatriates to acquire data and information from the territories upstream, while Uganda has been disadvantaged from the outcome of the process.⁴⁰⁷ In addition, Egypt is often

⁴⁰⁴ See *Uganda Country Paper*, Vth Nile 2002 Conference, Addis Ababa, Ethiopia, February 24-28, 1997 Proceedings, at 72. In order to strengthen its water resources information system, Uganda has been active in a number of other projects, such as FAO executed projects, Lake Victoria Environment Management Program (LVEMP).

⁴⁰⁵ *Exchange of notes constituting an agreement between the Government of the United Kingdom of Great Britain and Northern Ireland (on behalf of Uganda) and the Government of Egypt* regarding cooperation in meteorological, and Hydrological surveys in certain areas of the Nile Basin,, Cairo, 19 January; 28 February and 20 March 1950. Article 2. International Fresh Water Treaties, available at <http://ocid.nacse.org/tfdd/tfdddocs/148ENG.pdf>, accessed on 17 September 2011.

⁴⁰⁶ *Id.*, Article 3.

⁴⁰⁷ Howell, P., *East Africa's water requirements: the Equatorial Nile Project and the Nile Waters Agreement of 1929. A brief historical review*, in Howell, P., & Allan, A., (eds.), 'The Nile: sharing a scarce resource: An historical and technical review of water management and of economic and legal issues', Cambridge University Press, (1994), at 103.

mentioned as the architect of Hydromet Survey Project and took full advantage of the project from Uganda by deploying massive data collections.⁴⁰⁸

At the national level, the Ugandan National Water Policy promotes the gathering and maintaining of reliable water resources information and databases;⁴⁰⁹ data collection and data dissemination of relevant information for planning, development and use of water resources.⁴¹⁰ It is important to note that the policy recognizes data and information as ‘key to the rational and optimal management and use of the water resources.’⁴¹¹ In this regard, the Management Information System (MIS), established in 1998 can be a useful tool in developing data collection procedures.⁴¹² Quarterly data is collected and compiled by the Department of Water Development (DWD) and is shared with other stakeholder ministries.⁴¹³ This experience can provide insights into the nature of experience which can be applied in the implementation of the CFA’s data and information exchange. The National Water Quality Management Strategy⁴¹⁴ can also be of value in availing information on water quality monitoring activities on establishing databases, distribution and access; and serve as central repository of water quality data.⁴¹⁵ All these can impact the national laws and their capacity in facilitating the CFA’s demand on data and information exchange in Uganda.

⁴⁰⁸ Kabanda, B., & Kahangire, P., *Irrigation and Hydro-power potential and water needs in Uganda-an overview*, in Howell, P., & Allan, A., (eds.), ‘The Nile: sharing a scarce resource: An historical and technical review of water management and of economical and legal issues’, Cambridge University Press, (1994), at 221.

⁴⁰⁹ *The Republic of Uganda National Water Policy*, the Republic of Uganda, Ministry of Water, Lands and Environment, (1999), Paragraph 1.2(k).

Available at <http://www.ruwas.co.ug/reports/National%20Water%20Policy.pdf>, accessed on 18 September 2011.

⁴¹⁰ *Id.*, Paragraph 4.3.4.

⁴¹¹ *Id.*, 4(7)

⁴¹² *National Water Development Report, Uganda Case study*, 2nd UN World Water Development Report, (2006) at 170, available at <http://unesdoc.unesco.org/images/0014/001467/146760e.pdf>, accessed on 11 May 2012.

⁴¹³ *Id.*

⁴¹⁴ *National Water Quality Management Strategy*, the Republic of Uganda, September, 2006 at 46.

⁴¹⁵ *Id.*

4.6 The CFA Requirement on the Notification of Planned Measures

Prior notification on planned measures is an *ad hoc* provision of information, unlike the requirement of regular exchange of data and information, which is an on-going systematic process.⁴¹⁶ Introducing the concept of the principle of notification of planned measures within the national context can be invariably controversial; mainly, due to disagreement among the Nile Basin States on the issue. For instance, Ethiopia and Uganda have advanced differing positions during the CFA negotiations; with Ethiopia critical of incorporating detailed rules in to the CFA, while Uganda supporting its introduction. For Ethiopia, the issue of planned measures becomes relevant only if a water sharing arrangement acceptable to the basin states is put in place.⁴¹⁷

The lack of consensus among the Nile Basin countries regarding the introduction of detailed procedures in the CFA did not prevent the countries from endorsing the principle of notification of planned measures. Thus, Article 8 of the CFA sets:

1. Nile Basin States agree to exchange information through the Nile River Basin Commission.
2. Nile Basin States shall observe the rules and procedures established by the Nile River Basin Commission for exchanging information concerning planned measures.

It is very difficult to draw an analysis from the above general principle in the absence of detailed procedures. Moreover, it must also be noted that the absence of procedures has its own implications on the implementation of the principle of prior notification at the national level. However, the endorsement of the rule as a principle and the agreement to entrust the Nile River Basin Commission to establish rules and procedures can be viewed as a step towards the general obligation to exchange information concerning planned measures.

⁴¹⁶ ILC Commentary, *supra* note 50, Para 4, at 108.

⁴¹⁷ Final Report, Nile River Basin Cooperative Framework Project, *supra* note 42, Article 8.

4.7 Ethiopian National Case Study on Information Concerning Planned Measures

From a national perspective, the Ethiopian Water Resources Management Proclamation empowers the Ministry of Water Resources or any other body designated by it, to require plans and proposals from any person planning to undertake any kind of water works.⁴¹⁸ However, there are no specific applicable laws or policies relevant to measures on transboundary context; except implementation on a case-by-case basis. Thus, there are no clear provisions governing prior notification on planned measures under Ethiopian water resources management policy, proclamation or regulation. Existing activities on irrigation and hydropower projects on transboundary rivers dictate some national experiences supportive of the CFA's principle on information concerning planned measures.

Controversies regarding data sharing and information exchange on existing and planned measures have intensified following hydroelectric dam construction and agricultural investment in Ethiopia, and to a certain extent in Uganda. For instance, the Sudanese Government had requested all available data and information, including design and bidding documents with regard to the construction of the Tekeze dam project in 2005.⁴¹⁹ Ethiopia provided Sudan with information at the time was based on the principles of cooperation on Ethiopian water policy regarding transboundary water resources.

The announcement by Ethiopia of constructing the 'Great Renaissance Dam' had prompted a major legal dispute between Ethiopia and Egypt regarding prior notification of planned measures. Following the Egyptian Government's formal request of technical and

⁴¹⁸ *Ethiopian Water Resources Management Proclamation*, supra note 230, Art. 8(1-d).

⁴¹⁹ Official letter was sent to the Ministry of Foreign Affairs of the Federal Republic of Ethiopia, where the Ethiopian side reciprocated by making a request information on the Merowe Dam in Sudan. (Ministry of Water and Energy, the Federal democratic Republic of Ethiopia).

environmental studies of the dam⁴²⁰ a team of experts comprising members from Egypt, Sudan, Ethiopia, and international experts was set up to jointly investigate whether there might be any significant harm caused by the dam.⁴²¹

4.8 Ugandan National Case on Information Concerning Planned Measures

Uganda has accepted the principle and procedural rules on information concerning planned measures as a member of the Lake Victoria Basin Commission (LVBC); which also been endorsed in principle in the CFA. The LVBC procedures require Uganda as a State party to the agreement to notify other partner States and the Secretariat of planned activities within its territory regarding planned activities, which might have adverse effects on Partner States.⁴²² The notification includes providing technical data and information concerning planned project to enable the notified Partner States to evaluate the effects of the planned measures.⁴²³ The Ugandan National Water Policy provides that Uganda's policy principles adhere to accepted principles of international law on the use of shared water resources. This principle can support the implementation of CFA's principle on information concerning planned measures.⁴²⁴

In the absence of detailed procedures in the CFA regarding prior notification of planned measures, the Nile basin States can use their national policies and legislation and align their action on prior notification with the general principle and procedures of international water law. In this case the CFA states: 'Watercourse States shall exchange and consult each other and, if necessary, negotiate on the possible effects of planned measures on the condition of an

⁴²⁰ *Egypt requests Great Millennium Dam Studies from Ethiopia*, Almasry Alyoum, English Edition, 31/03/2011, available at <http://www.almasryalyoum.com/en/node/381856>, accessed on 03 September 2011.

⁴²¹ *Nile dam project not negotiable, says Ethiopia ahead of Egyptian PM visit*, Sudan Tribune, Wednesday 11 May 2011. Available at <http://www.sudantribune.com/Nile-dam-project-not-negotiable.38852>, accessed on 03 September 2011.

⁴²² Protocol for Sustainable Development of Lake Victoria Basin (adopted November 29, 2003), Article 13. Available online at www.internationalwaterlaw.org/documents/regionaldocs/Lake_Victoria_Basin_2003.pdf, (accessed March 29, 2014) (2003 Lake Victoria Basin Protocol).

⁴²³ Id.

⁴²⁴ Ugandan National Water Policy, *supra* note 253.

international watercourse.’⁴²⁵ However, there are gaps that require the development of both detailed procedures in the CFA and clearer national laws supporting the issues in a transboundary context. Among the requirements on the notification concerning planned measures is the result of Environmental Impact Assessment (EIA) that can enable the notified States to evaluate the possible effect of planned measures.

Article 9 of the CFA on Environmental impact assessment and audits provides:

1. For planned measures that may have significant adverse environmental impacts, Nile Basin States shall, at an early stage, undertake a comprehensive assessment of those impacts with regard to their own territories and the territories of other Nile Basin States.
2. The criteria and procedures for determining whether an activity is likely to have significant adverse environmental impacts shall be developed by the Nile River Basin Commission.
3. Where circumstances so warrant, according to criteria to be developed by the Nile River Basin Commission, a Nile Basin State that has implemented measures of the kind referred to in paragraph 1 shall conduct an audit of the environmental impacts of those measures. That State shall enter into consultations relating to the audit with Nile Basin States affected by the measures on their request.
4. The Commission, taking into account national legislation of the Nile Basin States, shall adopt criteria for carrying out audits of measures existing at the date of the entry into force of this Framework.
5. Nile Basin States shall carry out audits of measures existing at the date of the entry into force of this Framework in accordance with national legislation and under criteria adopted under this Framework.

The EIA provision under the CFA is an important supplementary requirement in the implementation of prior notification of planned measures. National EIA provisions can be

⁴²⁵ CFA, *supra* note 45, Article 7.

used in order to advance its implementation. The linkage with the national laws has been established under the CFA provisions, which required consideration of national laws. However, the criteria and procedures to be developed by the Nile River Basin Commission can further strengthen the realization of national and international law relationship.

4.8.1 National Legislative Framework on EIA in Ethiopia

Like many other Nile Basin States one of the most challenging problems facing Ethiopia is environmental crisis, which is responsible for the country's precarious economic and social state.⁴²⁶ Environmental resources are the foundation of social and economic development as they are the sources of goods and services needed for poverty reduction and economic growth; and thus, any mismanagement or underutilization reduces their contribution to Ethiopia's overall development.⁴²⁷ Transboundary environmental impacts are imperative in the Ethiopian context; because nearly ninety percent of the country's water resources are transboundary Rivers.

The Ethiopian Water Resources Management Policy introduces a number of objectives and principles supporting EIA and audits on water resources.⁴²⁸ The policy, by incorporating environment conservation and protection requirements as integral part of water resource management, encourages EIA in all water resources projects.⁴²⁹ While the Ethiopian Water Resources Management Policy can be considered useful for the national implementation of

⁴²⁶ Techlemichael, Y., 'Current status of the environmental impact assessment system in Ethiopia', UNEP EIA Training Resource Manual, Case Studies from Developing Countries, available at http://www.unep.org/publications/search/pub_details_s.asp?ID=87, accessed on 05 September 2011.

⁴²⁷ *Plan for Accelerated and Sustained Development to End Poverty (PASDEP)* (2005/6-2009/10), Volume I, Main Text, Ministry of Finance and Economic Development (MoFED), (September, 2006). Available at <http://www.ldphs.org.za/resources/local-government-database/by-country/ethiopia/national-policy/Plan%20for%20Urban%20Development%20and%20Urban%20Good%20Governance.PDF>, accessed on 05 September 2011.

⁴²⁸ The Policy provides principle to 'incorporate environment conservation and protection requirements as integral parts of water resources management'. Moreover, it provides to 'encourage that Environmental Impact Assessment and protection requirements serve as part of the major criteria in all water resources projects'. *Ethiopian Water Resources Management Policy*, supra note 224 at Paragraph 2.2.2.

⁴²⁹ Id., 2.2.2

transboundary EIA, the Ethiopian Environmental Policy provides an elaborate policy guideline regarding the EIA in Ethiopia. The guidelines are stated as follows:

- a) To ensure that environmental impact assessments consider not only physical and biological impacts but also address social, socio-economic, political and cultural conditions;
- b) To ensure that public and private sector development programmes and projects recognize any environmental impacts early and incorporate their containment into the development design process;
- c) To recognize that public consultation is an integral part of EIA and ensure that EIA procedures make provision for both an independent review and public comment before consideration by decision makers;
- d) To ensure that an environmental impact statement always includes mitigation plans for environmental management problems and contingency plans in case of accidents;
- e) To ensure that, at specified intervals during project implementation, environmental audits regarding monitoring, inspection and record keeping take place for activities where these have been required by the Environmental Impact Statement;
- f) To ensure that preliminary and full EIA's are undertaken by the relevant sectoral ministries or departments, if in the public sector, and by the developer, if in the private sector;
- g) To create by law an EIA process which requires appropriate environmental impact statements and environmental audits for private and state development projects?
- h) To establish the necessary institutional framework and determine the linkages of its parts for undertaking, coordinating and approving EIAs and the subsequent system of environmental audits required to ensure compliance with conditionalities;
- i) To develop detailed sectoral technical guidelines in EIAs and environmental audits;
- j) To ensure that social, socio-economic, political and cultural conditions are considered in environmental impact assessment procedures and included in sectoral guidelines; and

- k) To develop EIA and environmental audit capacity and capability in the Environmental Protection Authority, sectoral ministries and agencies as well as in the regions.⁴³⁰

The Ethiopian Conservation Strategy provides that EIA ‘should not consider only physical and biological impacts but also address social, socio-economic, political and cultural conditions.’⁴³¹ The Proclamation on Environmental Impact Assessment defines EIA as, ‘the methodology of identifying and evaluating in advance any effect, be it positive or negative, which results from the implementation of a proposed project or public instrument.’⁴³² The commencement of implementation of any project requiring EIA is authorized by the Ethiopian Environmental Protection Agency (EPA) or the relevant regional environmental agencies.⁴³³ The law provides for two categories of projects; those not likely to have negative impacts and those, which require EIA and likely to have negative impacts.⁴³⁴ Accordingly, projects which cause negative impacts are large projects that require EIA must include transboundary waters of such nature.

The existing laws can set basic rules conducive to supporting international EIA commitments under the CFA. However, the lack of detailed procedures for conducting EIA at the national and basin levels is the main weakness which needs to be coordinated within the future procedures to be developed by the NRBC.

4.9 National Legislative Framework on EIA in Uganda

The National Environment Act in Uganda requires a project to undertake an EIA, if the lead agency is of the view that particular project may have an impact or is likely to have or will

⁴³⁰ Article 4.9 (a-k), Ethiopian Environmental Policy, Federal Democratic Republic of Ethiopia, Addis Ababa, Ethiopia, (1997).

⁴³¹ Paragraph 144(b), *National Conservation Strategy*, Volume II, National Policy on Natural Resources and the Environment, the Federal Democratic Republic of Ethiopia, (1996).

⁴³² Federal Negarit Gazeta, of the Federal Democratic Republic of Ethiopia, Proclamation No. 299/2002, *Environmental Impact Assessment Proclamation*, Article 2(3).

⁴³³ Id., Article 3 (1).

⁴³⁴ Id., Article 5 (1).

have a significant impact on the environment.⁴³⁵ The law requires an audit of all activities that are likely to have significant effect on the environment.⁴³⁶ It also monitors all environmental phenomena with a view to making an assessment of any possible changes in the environment and their possible impacts.⁴³⁷

The Environmental Impact Assessment Regulations came into force on May 1998⁴³⁸ states, ‘a licensing authority under any law in force in Uganda, shall require the production of a certificate of approval of environmental impact assessment before issuing a licence for any project identified in accordance with the regulation.’⁴³⁹ The requirement is equally applicable to transboundary water resources as the law puts no distinction. The regulation also provides the procedures to be followed in the process of the EIA; among them, the manner of preparation of project brief by a developer; the time frame for comments by the lead agency; and the approval of the project brief.⁴⁴⁰ The review process of the EIA requires calls for an invitation to general public comments or a public hearing.⁴⁴¹

The National Environment (Audit) Regulation is a piece of legislation supplementing the EIA by providing procedures for determining the compliance status with environmental regulatory requirements, environmental management system and the overall environmental risk.⁴⁴² In Uganda, the EIA as part of information sharing and prior notification on transboundary projects had an impact on the construction of the Bujagali hydropower dam.⁴⁴³ As Uganda’s

⁴³⁵ *The National Environmental Act*, Cap 153, 1995, Article 19. Available at http://www.nemaug.org/regulations/national_environment_act.pdf, accessed on 10 September 2011.

⁴³⁶ Id., Article 22(1).

⁴³⁷ Id., Article 23 (1), (a).

⁴³⁸ *Environmental Impact Assessment Regulation*, S.I., No.13/1998, Article 3 (1, a-b). Available at http://www.nemaug.org/regulations/eia_regulations.pdf, accessed on 10 September 2011.

⁴³⁹ Id., Article 3 (3).

⁴⁴⁰ Id., Articles 5-9.

⁴⁴¹ Id., Articles 19-21.

⁴⁴² *The National Environment (Audit) Regulations*, 2006. Available at http://www.nemaug.org/regulations/audit_regulations.pdf, accessed on 11 September 2011.

⁴⁴³ Oweyegha-Afunaduula, F.C., ‘*Environmental Governance in the Nile Basin: The Case of Uganda*’, Proceedings, Nile Basin Development Forum: Environment & Water Resources Management for Peace and Cooperation in the Nile Basin, 17th -19th November 2008, Khartoum, Sudan, at 81.

electricity demand in the country continues to grow, tremendous power shortages and an interrupted load-shedding during peak periods have become frequent.⁴⁴⁴ Uganda has started the construction of the World Bank financed Bujagali hydropower project, with a potential capacity of 250 MW on the Victoria. Negative impacts of the project have been reported by the EIA.⁴⁴⁵ Among a number of supporting EIA legislations related to the EIA are the National Environment (Wetlands, River Banks and Lakeshore-Management) Regulations.⁴⁴⁶ The National Environment (Standards for Discharging of Effluent in to Water or on Land) Regulations is another instrument, which requires general obligations in discharging effluent mitigating pollution.⁴⁴⁷ Other laws relevant to the EIA include, the National Forestry and Tree Planting Act;⁴⁴⁸ the National Environment (Minimum Standards for Management of Soil Quality), Regulations;⁴⁴⁹ the National Environment (Waste Management Regulations);⁴⁵⁰ and the National Environment (Hilly and Mountainous Area Management) Regulations.⁴⁵¹

Despite gaps that exist within the national laws and institutions, the national legal framework in Ethiopia and Uganda can support transboundary EIA and advance the implementation of international commitment under the CFA. Under the CFA the Nile Basin States are required to

⁴⁴⁴ Mulira, J., *Independent Uganda and the Nile: Hydroelectric Projects and Plans*, in Tvedt, T., (eds.), 'The River Nile in Post-Colonial Age: Conflict and Cooperation among the Nile Basin Countries', I.B. TAURIS, London, (2010) at 144.

⁴⁴⁵ *Bujagali Project Hydropower Facility: Environmental Impact Assessment Main Report*, African Development and Economic Consultants (ADEC), Ltd., Nairobi, Kenya, (March 2001).

Available at http://www-wds.worldbank.org/external/default/WDSCContentServer/WDSP/IB/2001/06/23/000094946_01051204043328/Rendered/PDF/multi0page.pdf, accessed on 12 September 2011.

⁴⁴⁶ *The National Environment (Wetlands, River Banks and Lakeshores Management) Regulations* No.3/2000. Available at http://www.nemaug.org/regulations/wetlands_riverbanks.pdf, accessed on 11 September 2011.

⁴⁴⁷ *The National Environment (Standards for Discharges of Effluent in to Water or Land) Regulations*, S.I. No. 5/1999. Available at http://www.nemaug.org/regulations/effluent_discharge_regulations.pdf, accessed on 11 September 2011.

⁴⁴⁸ The National Forestry and Tree Planting Act, 8/2000. Available at http://www.nemaug.org/regulations/forestry_tree_planting_act.pdf, accessed on 11 September 2011.

⁴⁴⁹ *The National Environment (Minimum Standards for Management of Soil Quality), Regulations* 200. Available at http://www.nemaug.org/regulations/minimum_standards_for%20management_of_soil.pdf, accessed on 11 September 2011.

⁴⁵⁰ *The National Environment (Waste Management Regulations)*, S.I. No. 52/1999. Available at http://www.nemaug.org/regulations/waste_management_regulations.pdf, accessed on 11 September 2011.

⁴⁵¹ *The National Environment (Hilly and Mountainous Area Management) Regulations*, 2000. Available at http://www.nemaug.org/regulations/hilly_and_mountanous_areas_management_regulations.pdf, accessed on 11 September 2011.

carry out audits of measures existing at the date of the entry into force of the Framework in accordance with their national legislations.

The procedural principles discussed above can be realized with participation of relevant stakeholders or public participation.

4.10 Public Participation

The CFA provides a provision regarding participation in the development and protection of the Nile River Basin in planning and implementing a project.⁴⁵² It requires the Nile Basin States to allow all those within a State who will or may be affected by the project in that State to participate in an appropriate way in the planning and implementation process.⁴⁵³

Public participation in the Nile Basin is an emerging idea, which still continues to take some shape in order to bear an affirmative influence on the projects and programmes in the basin. Currently the Nile Basin Discourse (NBD) is an active network of civil society organizations of the Basin countries which tries to influence decision in the Nile Basin.⁴⁵⁴ National activities on transboundary public participation are facilitated under the national chapters in the Basin States, such as Uganda⁴⁵⁵ and Ethiopia.⁴⁵⁶ The national activities can play vital role in establishing a network of civil society organizations (CSOs) and Non-governmental Organizations that can have strong influence over national legislation.

The NBD is not, however, has no strong influence over challenging issues such as the implementation of planned projects or on the outcome of negotiations of the CFA, as most of

⁴⁵² CFA, supra note 45, Article 10 (a).

⁴⁵³ Id.

⁴⁵⁴ *The Nile Basin Discourse*, available at <http://thesaurus.com/browse/positive>, accessed on 14 November 2011.

⁴⁵⁵ Nile Basin Discourse, Uganda, available at http://www.nilebasindiscourse.org/index.php?option=com_content&view=article&id=77:uganda&catid=49:uganda&Itemid=61, accessed on 18 November 2011.

⁴⁵⁶ Nile Basin Discourse-Ethiopia, available at http://www.nilebasindiscourse.org/index.php?option=com_content&view=article&id=53:ethiopia&catid=44:ethiopia&Itemid=57, accessed on 18 November 2011.

its activities are confined within awareness creation activities.⁴⁵⁷ One of the most critical challenges cited for this weakness in impacting national decision is the indirect involvement of governments. Mainstream Civil Society Organizations (CSOs) representing genuine grass root stakeholders are denied sufficient space in favour of government affiliated CSOs.⁴⁵⁸

The subject of public participation in the Nile is part and parcel of the broader long existing basin challenges, primarily, the result of historical acrimony between downstream and the upstream States.⁴⁵⁹ There had been lack of plan, procedures for engagement, implementation, monitoring and evaluation of stakeholders at regional and national levels.⁴⁶⁰ Moreover, apart from the lack of legal considerations and political dominance of transboundary decision making, there had been persistent lack of capacity in networking, awareness, expertise and strategic action as some of the challenges to engagements and public participation.⁴⁶¹ To what extent these challenges impact the national laws and the implementation of CFA at the national levels in Ethiopia and Uganda require analysis of exiting practice in supporting the CFA provisions on public participation.

4.10.1 Public Participation under Ethiopian Law

A number of statutory laws, including constitutional provisions in Ethiopia support the principle of public participation, which underlies the right of access to justice. Accordingly, the Ethiopian Constitution provides:

⁴⁵⁷ See the following documents pertaining the activities of *Nile Basin Discourse, Ethiopia, The proceeding of the National Multi-stakeholder forum on the Benefits and costs of Nile cooperation*, September 24, 2010, Addis Ababa, Ethiopia; *Proceedings of the National Information Sharing Workshop on the Achievements of SVP and the current ISP, the Progress of ENSAP Projects, CFA, and the principles of Benefit Sharing Versus water Sharing in the Nile*, March 30, 2009, Addis Ababa, Ethiopia; *Proceedings of the National Workshop on NBI over the past 10 years: Retrospect and prospect, Ethiopian Nile Basin Discourse Forum*, December 2009, Addis Ababa, available at http://www.nilebasindiscourse.org/index.php?option=com_content&view=article&id=53:ethiopia&catid=44:ethiopia&Itemid=57, accessed on 20 November 2011.

⁴⁵⁸ Id.

⁴⁵⁹ Nicol, A., 'The Nile: Moving Beyond Cooperation', 16 PC-CP Series, (2001-2003) at 2-3.

⁴⁶⁰ Hailu, A., & Michago, W., 'An Appraisal of Civil Society Participation in the Nile Basin Initiative', Proceedings, the Nile Basin Development Forum, November 30-December 2, 2006, Addis Ababa, Ethiopia, at 28-29 of 203. (Ministry of Water and Energy, Ethiopia)

⁴⁶¹ Id.

(1) Everyone has the right to bring a justiciable matter to, and to obtain a decision or a judgement by a court of law, or any other competent body with judicial power.

(2) The decision or judgement referred to sub-article 1 of this Article may also be sought by any association representing the Collective or individual interest of its members, or any group or a person who is a member of, or represents a group with similar interests.⁴⁶²

Article 92 (3) of the Constitution guarantees the right to full consultation and expression of views in planning and implementation of environmental policies and projects that directly affecting citizens.⁴⁶³ This constitutional right cannot be derogated by any other law, as the constitution is the highest law of the land. The right to public participation in environmental matters is also reflected under the Ethiopian Environment Policy. The policy on community participation is to ‘ensure all phases of environmental and resource development and management, from project conception to planning and implementation to monitoring and evaluation.’⁴⁶⁴ The policy considerations sets mechanisms for realization of public participation, including reorientation of natural resources professionals; the development of effective methods for popular participation and putting in place the necessary legislation; capacity building; grass root empowerment and gender equality.⁴⁶⁵

The Federal Environmental Impact Assessment Proclamation requires public agencies responsible for environmental protection to make accessible any environmental impact study reports at their disposal for public comments.⁴⁶⁶ Moreover, the law demands direct actions by agencies to ensure that public comments by communities likely to be affected are implemented.⁴⁶⁷

⁴⁶² *The Constitution of the Federal Republic of Ethiopia*, supra note 62, Article 37.

⁴⁶³ Id., Article 92(3).

⁴⁶⁴ Federal Democratic Republic of Ethiopia, Environmental Policy, Environmental Protection Authority, Addis Ababa, 02 April 1997.

⁴⁶⁵ Id.

⁴⁶⁶ *Environmental Impact Assessment Proclamation*, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, Proclamation No. 299/2002, Article 15.

⁴⁶⁷ Id.

The Ethiopian Water Resources Management Policy sets principles for the identification of stakeholders and their involvement in the process of any water projects.⁴⁶⁸ However, despite the laws stating the rights, no specific by-laws and institutional framework are put in place for the implementation of the provision on these rights.

4.10.2 Public Participation under Ugandan Laws

Uganda is a signatory to a larger number of international and regional treaties on universal human rights including the right to public participation and access to justice.⁴⁶⁹ Being a party to international agreements, however, does not mean guaranteed their implementation, unless

468 *Ethiopian Water Resources Management Policy*, supra note 224, section 2.2.9 (1).

469 Some of the treaties Uganda is party to include, UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, (Entry into force: 23 March 1976), available at: <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html>, Accessed 31st December 2011.; *Optional Protocol to the International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, entered into force March 23, 1976, available at <http://www1.umn.edu/humanrts/instree/b4ccprp1.htm>, Accessed on 31st December 2011.; UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 United Nations, Treaty Series, at 3, (Entry into force: 3 January 1976), available at <http://www.unhcr.org/refworld/docid/3ae6b36c0.html>, accessed 31st December 2011.; UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, (Entry into force: 4 January 1969), available at: <http://www.unhcr.org/refworld/docid/3ae6b3940.html>, accessed 31st December 2011.; UN General Assembly, *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 United Nations, Treaty Series, at 13, (Entry into force: 3 September 1981), available at: <http://www.unhcr.org/refworld/docid/3ae6b3970.html>, accessed 31st December 2011.; UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, 1577 United Nations, Treaty Series, at 3, (Entry into force: 2 September 1990), available at: <http://www.unhcr.org/refworld/docid/3ae6b38f0.html>, accessed 31st December 2011.; UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158, (Entry into force: 1 July 2003), available at: <http://www.unhcr.org/refworld/docid/3ae6b3980.html>, accessed 31st December 2011.; UN General Assembly, *Convention on the Rights of Persons with Disabilities*, 13 December 2006, A/RES/61/106, Annex I, (Entry into force: 3 May 2008), available at: <http://www.unhcr.org/refworld/docid/4680cd212.html>, accessed 31st December 2011.; Organization of African Unity, *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), (Entry into force: 21 October 1986) available at: <http://www.unhcr.org/refworld/docid/3ae6b3630.html>, accessed 31st December 2011.; Organization of African Unity, *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990), (Entry into force: 29 November 1999), available at: <http://www.unhcr.org/refworld/docid/3ae6b38c18.html>, accessed December 2011.; Organization of African Unity, *Treaty Establishing the African Economic Community*, Abuja, Nigeria, 30 I.L.M., 1241 (1991), available at http://www.africa-union.org/root/au/Documents/Treaties/Text/AEC_Treaty_1991.pdf, accessed on 31st December 2011.;

corresponding national laws are put in place. The Ugandan Constitution provides civic and political rights and allows public participation in the affairs of the country. Article 38 stipulates:

1. Every Ugandan citizen has the right to participate in the affairs of government, individually or through his or her representatives in accordance with law.
2. Every Ugandan has a right to participate in peaceful activities to influence policies of government through civic organizations.⁴⁷⁰

Access to information held by state is recognized under the constitution, although the state exercises discretion in determining the type of information to be public. The constitution states:

- (1) Every citizen has a right of access to information in the possession of the State or any other organ or agency of the State except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person.
- (2) Parliament shall make laws prescribing the classes of information referred to in clause (1) of this article and the procedure for obtaining access to that information.⁴⁷¹

Access to justice includes the right to just and fair treatment before any administrative bodies and the right to apply to a court of law against administrative decisions.⁴⁷² One of the important aspects of these rights enables the civil society to pursue enforcement of these rights using public interest litigation.⁴⁷³ Therefore, the Constitution provides enforcement of rights and freedom to a court of law under Article 50:

⁴⁷⁰ *The Constitution of the Republic of Uganda*, (1995), supra note 215.

⁴⁷¹ *Id.*, Article 41.

⁴⁷² *Id.*, Article 42.

⁴⁷³ Akello, C.E., 'Environmental regulation in Uganda: Success and Challenges', 3/1 Law, Environment and Development Journal (2007), at 23, available at <http://www.lead-journal.org/content/07020.pdf>, accessed on 19 November 2011.

1. Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened is entitled to apply to a competent court for redress which may include compensation.
2. Any person or organisation may bring an action against the violation of another person's or group's human rights.
3. Any person aggrieved by any decision of the court may appeal to the appropriate court.
4. Parliament shall make laws for the enforcement of the rights and freedoms under this Chapter.⁴⁷⁴

The Ugandan water and environment policies endorse legislative designs to ensure environmental concerns. The policies are integrated in to the planning process at the national, local and community level, although their implementation may be questionable.⁴⁷⁵ The role of civil society and the NGOs with regard to the EIA is the most important activity of advocacy groups in Uganda.⁴⁷⁶ As a result of this pressure 'the rights of affected communities on matters such as compensation and resettlement are now on the forefront.'⁴⁷⁷

The 1995 Ugandan National Environmental Act encourages, 'maximum participation by the people of Uganda in the development of policies, plans and processes for the management of the environment.'⁴⁷⁸ In addition, the 1998 Environmental Impact Assessment Regulation requires general public comments and hearing if a project may cause transboundary impacts.⁴⁷⁹ Accordingly, 'as part of the consultative process peoples' public

⁴⁷⁴Id., Article 50.

⁴⁷⁵ See, the Republic of Uganda, National Environment Management Authority (NEMA), *Annual Performance Report*, 2008/9, July 2009 at 10. Available at [http://www.nemaug.org/reports/nema%27s annual performance report.pdf](http://www.nemaug.org/reports/nema%27s%20annual%20performance%20report.pdf), accessed on 24 November 2011.

⁴⁷⁶Eccat, J., 'A Review of the Application of Environmental Impact Assessment (EIA) in Uganda, A Report Prepared for the United Nations Economic Commission for Africa, October 2004, at 33, available at <http://www.uneca.org/sdd/documents/ReportEIAUgandaFinal.pdf>, accessed on 05 January 2012.

⁴⁷⁷Id.

⁴⁷⁸*The National Environmental Act, Cap 153*, An Act to provide for sustainable management of the environment; to establish an authority as a coordinating, monitoring and supervisory body for that purpose; and for other matters incidental to or connected with the foregoing, Article 2(b), available at http://www.nemaug.org/regulations/national_environment_act.pdf, accessed on 05 January 2012.

⁴⁷⁹*The Environmental Impact Assessment Regulation*, S.I. No. 13/1998, Article 12, available at http://www.nemaug.org/regulations/eia_regulations.pdf, accessed on 05 January 2012.

hearing on the Bujagali Project was held in order to obtain views and facts on the...Project.⁴⁸⁰ The consultation involved ‘the dam-affected communities, the private sector, the academia, the dam developer (BEL), Government of Uganda, National Environment Management Authority (NEMA), the World Bank, civil society, cultural institutions and other stakeholders.’⁴⁸¹ The consultation issues included compensation, compliance, and the decline of Lake Victoria levels, dam safety and other issues.⁴⁸² Failure to agree on some of the issues prompted the NGOs to take the Government to the Court; a mark of a successful transboundary court case.

4.10.3 The Case Concerning the Bujagali Project

The construction of dams in Uganda, in particular, those on the Owen Falls (Nalubaale and Kiira) were said to be responsible for a portion of the Lake Victoria’s drop of water levels.⁴⁸³ Hydrologists are of the opinion that the primary causes of severe drops estimated to be 55% between the years 2004-2005 were the result of over-releases from the dams.⁴⁸⁴ The controversial dam, the Bujagali dam is considered by the Government of Uganda as a solution to the problem of regular power cuts and blackouts across the country.⁴⁸⁵ Ugandan civil society groups called on the World Bank to hold financing the project and made further request to the Government for the release of the project contract to the public for discussions on their impacts, risks and obligations the project might entail over its life

⁴⁸⁰ The Un-resolved Issues in the Bujagali Dam Project in Uganda: A Lack of Transparency and Public Participation, A Public of National Association of Professional Environmentalists (NAPE), (2007) at 3. Available at http://www.nape.or.ug/lib/DAMS_Bujagali_Unresolved_Issues.pdf, accessed on 19 June 2012.

⁴⁸¹ Id.

⁴⁸² Id., at 3-10.

⁴⁸³ See, Kull, D., ‘Connections between Recent Water Level Drops in Lake Victoria, Dam Operations and Drought’, (2006) for details, available at <http://www.internationalrivers.org/files/060208vic.pdf>, accessed on 08 December 2011.

⁴⁸⁴ Robert, A., ‘Dam Construction Flows and the Receding Lake Victoria-Uganda’, Makerere Institute of Social Research, Makerere University, Paper presented at the 10th International River symposium 10th River and Environmental Flows Conference, Brisbane Australia, (3rd September 2007) at 1. Available at http://www.riversymposium.com/2005/index.php?element=2007APUNYO_R, accessed on 08 December 2011.

⁴⁸⁵ Sarah, G., ‘Controversial dam divides Ugandans’, BBC News, Friday, 27 April 2007, available at <http://news.bbc.co.uk/1/hi/world/africa/6589495.stm>, accessed on 08 December 2011.

time.⁴⁸⁶ Most of the issues highlighted were, the impact of the dam on fisheries; local communities; its ability to provide affordable energy; and the reduction of outflows from Lake Victoria.⁴⁸⁷

The National Association of Professional Environmentalists of Uganda, representing the local population, filed a claim with the World Bank Inspection Panel led to an investigation by the Panel.⁴⁸⁸ The Inspection Panel made critical recommendations regarding the impact of the dam on natural habitat; its effects on climate change and the fact that cumulative effects of multiple dams on the Nile were not properly addressed in the project documents.⁴⁸⁹ Therefore, the Panel recommended for the appointment of an independent panel of internationally recognized environmental specialists for the project and the need for an Environment Management Plan before the World Bank can release more funds for the project.⁴⁹⁰ However, the World Bank rejected these findings or recommendations and went ahead with the approval of the project finance.⁴⁹¹

The Bujagali dam also generated a high profile court case concerning the right to public information in *Green Watch (U) Limited vs. the Attorney General & Uganda Electricity Transmission Company Limited*. Green Watch (U) Limited, an NGO active in advocacy on

⁴⁸⁶ Peter Bosshard, 'The World Bank's next white elephant', *The Guardian*, Sunday 23 June 2002, available at <http://www.guardian.co.uk/world/2002/jun/23/economy/print>, accessed on 08 December 2011.

⁴⁸⁷ Horta, K., and Pottinger, L., 'Dam shame', *The Guardian*, Wednesday 23 January 2008, available at <http://www.guardian.co.uk/environment/2008/jan/23/water.energy>, accessed on 08 December 2011.

⁴⁸⁸ Letter submitted by the National Association of Professional Environmentalists of Uganda to World Bank Inspection Panel, 01 March 2007, available at <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/InspectionPanelClaim.pdf>, accessed on 08 December 2011.

⁴⁸⁹ See *Summary of Key Findings from the Inspection Panel Investigation Report on Bujagali Hydropower Project*, Uganda, NAPE (Uganda), International Rivers (US) and Bank Information Centre (US), (November 2008), available at http://www.google.co.uk/search?hl=en&source=hp&biw=1280&bih=552&q=findings+of+the+Inspection+Panel+of+the+World+Bank+on+Bujagali&btnG=Google+Search&oq=findings+of+the+Inspection+Panel+of+the+World+Bank+on+Bujagali&aq=f&aql=&gs_sm=s&gs_upl=16291131810101340341301012910101203120312-11110, accessed on 07 January 2012.

⁴⁹⁰ *Id.*

⁴⁹¹ Pottinger, L., See *World Bank, EIB approve Bujagali Dam despite major flaws*, International Rivers, December 15, 2007, available at <http://www.internationalrivers.org/en/africa/bujagali-dam-uganda/world-bank-eib-approve-bujagali-dam-despite-major-flaws>, accessed on 09 December 2011.

environmental protection, in its application to the High Court of Uganda stated that it sought to obtain a copy of the Power Purchase Agreement from the Government of Uganda, but was denied by the Permanent Secretary.⁴⁹² The Uganda Electricity Board contended that the Government in its sovereign capacity made undertakings to the parties to the Power Purchase Agreement and in all related agreements, not to divulge the said Agreements to the public. It stated further that the Power Purchase Agreement contains clauses on confidentiality and protection of intellectual property, which do not permit it to avail to the entire public. The Attorney General, a party to the case as a respondent also maintained the same position.

The Court in examining whether the Power Purchase Agreement is or is not a public document, in light of the peculiar circumstances surrounding the Power Purchase Agreement, stated that, as the said agreement was signed by the Minister of Energy and Mineral Development on behalf of Government of the Republic of Uganda, ‘the minister is without doubt a member of the executive organ of the Government of Uganda, and this Implementation Agreement is an act in her official capacity. It is therefore a public document.’ It further stated that ‘as the Implementation Agreement is a public document, and the Power Purchase Agreement is incorporated by reference into the Implementation Agreement. I find therefore that the Power Purchase Agreement is a public document too.’⁴⁹³ In addition, the Court ruled that Uganda Electricity Transmission Company Limited, a limited liability company, wholly owned for the time being by Government as a limited liability company, is an agent of Government and information in the company’s possession on account of the project is information in the hands of a state agency, within meaning of the Ugandan Constitution. Article 41(1) of the Constitution provides,

⁴⁹²*Green Watch (U) Limited vs. the Attorney General & Uganda Electricity Transmission Company Limited*, Republic of Uganda, in the High Court of Uganda at Kampala, HCT-00-CV-MC-0139 of 2001, available at <http://www.ulii.org/ug/cases/UGHC/2002/28.html>, accessed on 07 January 2012.

⁴⁹³ *Id.*

‘Every citizen has a right of access to information in the possession of the State or any other organ or agency of the State except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to privacy of any other person.’⁴⁹⁴

The Court also rejected the claim by the Government that the disclosure to the public of the agreements in question would affect the security of the state or its sovereignty. The claim provided no grounds to reach such a conclusion. The Court, therefore, declared that the Implementation Agreement and the Power Purchase Agreement are public documents.

The above ruling was a significant step in transboundary public participation in the form of access to justice for communities and parties affected. The disclosure of the documents saved hundreds of millions of dollars that Ugandans would have paid in excess if the Bujagali dam was built according to earlier plan. The judgement also led to investigations of corruption in the process by the World Bank and U.S. Department of Justice and eventually forced Nile Power Limited to withdraw from the project.⁴⁹⁵

The above ruling established that courts of law can be used in the implementation of constitutional provisions with regard to the right of access to information. It also showed a relatively better access to justice in Uganda on transboundary public participation as compared to that in Ethiopia.

With regard to the role of the NGOS and SCOs, the Ugandan Government considers their role as a vehicle for its realization of MDG's through universal access to safe, sustainable water and improved sanitation.⁴⁹⁶ The Uganda Water and Sanitation NGO Network (UWASNET), a national umbrella organisation for Civil Society Organisations (CSO's) in the water and

⁴⁹⁴ *Ugandan Constitution*, supra note 215, Article 41(1).

⁴⁹⁵ See Power Giant AES Withdraws From Uganda Dam Project, Environment News Service; August 13, 2003. Available at <http://www.ens-newswire.com/ens/aug2003/2003-08-13-02.html>, accessed on 21 June 2012.

⁴⁹⁶ See, the Republic of Uganda, *National Environment Management Authority (NEMA), Annual Performance Report*, 2008/9, July 2009 at 10. Available at http://www.nemaug.org/reports/nema%27s_annual_performance_report.pdf, accessed on 24 November 2011.

environment sector, is actively engaged in strengthening collaboration between NGO's, and promote partnerships in the development and implementation of sector policies and strategies.⁴⁹⁷ However, there are weaknesses, among them, laws designed for political convenience to the Government.⁴⁹⁸ One such law, which restricts their activities, is the Non-Governmental Organizations Registration Amendment Act 06 defining the role of NGOs.⁴⁹⁹

A comparative examination of the Ethiopian and Ugandan cases has shown that both have enshrined the rights to information, public participation, and dispute settlement within important policy documents, however, lacked some more details that can properly correspond to the procedural rules required under the CFA.

It is also important to note that in both case studies the existing laws can accommodate or support the implementation of commitments under the CFA. However, the constitutional provisions or policy directions alone do not provide full guarantee without strengthened legal and institutional framework. There are some differences between Ethiopian and Ugandan legal systems. The Ethiopian legal system, while granting basic rights on public participation, is very limited in providing rules or procedures for actual implementation, while the Ugandan experience can be described as better organized, duly decentralized offer a degree of independent local decisions on matters affecting the community; although such practices are far from perfect.

The role of the NGOs and SCOs in public participation is more evident in Uganda than in Ethiopia. In Ethiopia, despite the existence of a large number of NGOs and SCOs under the

497 *Uganda Water and Sanitation NGO Network (UWASNET)*, available at http://uwasnet.org/index.php?option=com_content&view=article&id=5&Itemid=2, accessed on 24 November 2011.

498 See *Uganda-International Centre for Not-for-Profit Law (ICNL)*, available at <http://www.icnl.org/knowledge/ngolawmonitor/pdf/Uganda.pdf>, accessed on 27 November 2011.

499 *Non-Governmental Organizations Registration (Amendment) Act 25*, Acts Supplement No.8 to the Ugandan Gazette No.47, Vol. XCVIX, 4th August 2006, available at <http://www.cgap.org/gm/document-1.1.6018/Non-governmental%20Organizations%20Registration%20%28Amendment%29%20Act,%202006.pdf>, accessed 05 January 2012.

umbrella of one of the largest NGOs, Consortium of Christian Relief and Development Association (CCRDA),⁵⁰⁰ their role in activities such as advocacy with regard to promoting public participation is curtailed by restrictive laws. In comparison, the role of the NGOs and CSOs in public participation is more accommodative in Uganda due to strong advocacy groups. They actively participate in the arrangement of people's 'public hearing' on transboundary matters, such as the Bujagali Project. The strength of the Ugandan legal framework is that it allowed the right to access to justice, where citizens could take the government to court and force to disclose information affecting communities. In Ethiopia, despite the constitutional right to public participation and access to justice, there is hardly any attempt to bring cases to the attention of courts, as the courts have no mandates to declare restrictive laws 'unconstitutional'.

Finally, constitutional guarantees on the right to information, public participation and access to justice in Uganda and Ethiopia offer a basis for the management of water resources both at the national and transboundary levels, by addressing the concerns of those which might be affected in the use and development activities, as required under the CFA. The lack of proper implementation mechanisms and restrictive laws can undermine the role of the NGOs and CSOs. However, the Ethiopian system can be allowed to function in consonant with the CFA by introducing laws facilitating the implementation of public participation; strengthening the role of the NGOs and CSOs, and judicial reform for the realization of access to justice.

500 'Consortium of Christian Relief and Development Association (CCRDA) formerly known as CRDA is an indigenous non-profit umbrella organization. It is an association of Non-Governmental Organizations (NGOs) and Civil Society Organizations (CSOs) engaged in relief, rehabilitation, and diverse developmental activities focusing on poverty alleviation and. It is the first legally registered association of NGOs/CSOs operating in Ethiopia and serves as a forum for collective vision and action. It allows resource mobilization and the sharing of experiences for effective and sustained impact. CCRDA builds capacity to ensure efficiency and quality are met, efforts are not duplicated and lessons can be learnt. All these are geared towards championing 1 transformational development.' Available at <http://www.crdaethiopia.org/aboutCRDA.php>, accessed on 20 June 2012.

4.11 Dispute Settlement Mechanisms under the CFA

The Nile is one of the shared river basins where the severity or intractability of disputes is determined by upstream and downstream politics rather than water scarcity or legal contentions.⁵⁰¹ The Basin lacked what Boisson de Chazournes referred to as, ‘workable institutional and conventional frameworks, within which states can interact, consult and exchange information.’⁵⁰² In the same manner, the existing structure of the NBI lacks regulatory enforcement and adjudication concerning disputes or disagreements over the use of water resources.⁵⁰³ The existing structure of the NBI has no procedural rules governing dispute settlement, where every dispute has to come to the attention of the Council of Ministers, where consensual decisions are usually difficult.

The CFA provisions on dispute settlement provide:

1. In the event of a dispute between two or more Nile Basin States concerning the interpretation or application of the present Framework, the States concerned shall, in the absence of an applicable agreement between them, seek a settlement of the dispute by peaceful means in accordance with the following provisions:

(a) If the States concerned cannot reach agreement by negotiation requested by one of them, they may jointly seek good offices, or request mediation or conciliation by, the Nile River Basin Commission or other third party, or agree to submit the dispute to arbitration, in accordance with procedures to be adopted by the Council, or to the International Court of Justice.

(b) If after six months from the time of the request for negotiations referred to in paragraph 2, the States concerned have not been able to settle their dispute through negotiation or any other means referred to in paragraph 2, the dispute shall be submitted, at the request of any of the parties to the dispute, to impartial fact-finding in accordance with the Annex on the fact-finding Commission, unless the States concerned otherwise agree.

⁵⁰¹ McCaffrey, S.C., Water Disputes Defined: Characteristics and Trends for Resolving Them, in The International Bureau of the Permanent Court of Arbitration, (eds.), *Resolution of International Water Disputes*, (Kluwer Law International, London, 2002) at 87.

⁵⁰² Laurence Boisson de Chazournes, The Role of Diplomatic Means of Solving Water disputes: A Special Emphasis on Institutional Mechanism, in The International Bureau of the Permanent Court of Arbitration, (eds.), *Resolution of International Water Disputes*, (Kluwer Law International, London, 2002) at 91.

⁵⁰³ Swain, A., ‘Challenges for water sharing in the Nile basin: changing geo-politics and changing climate’, 56 *Hydrological Sciences Journal*, (2011) at 698.

The implementation of dispute settlement under the CFA requirement requires supporting national laws, which the parties to the dispute exercise at domestic level. Therefore, it is important to examine dispute settlement mechanisms in Ethiopia and Uganda in order to understand the extent of their support in the settlement of transboundary water disputes.

4.11.1 Dispute Settlement under Ethiopian Law

The types of disputes over water resources in Ethiopia include disputes with other riparian States; interstate disputes between regional states; and disputes between Federal or local governments and stakeholders or communities. The Ethiopian constitution incorporates the universal principle of ‘settlement of international disputes by peaceful means’ as one of its foreign policy objectives.⁵⁰⁴ The management of water disputes within the national border and among domestic users and uses are handled by different organs of the Government depending on the types of the disputes. The supervisory body mandated to ‘examine and decide disputes between permit holders, as well as between a permit holder and a third party concerning rights or obligations arising from permits’ are the Ministry of Water and Energy.⁵⁰⁵ Decisions which are made by the Ministry in this regard include determination and execution of the issue of compensation.⁵⁰⁶ The law allows parties, which are not satisfied with the Ministry’s decision may resort to a court of law.⁵⁰⁷

The Ethiopian Water Resources Management Proclamation and the Ethiopian Water Resources Management Regulation provided provisions on negotiation and arbitration. Disputes between the Ministry of Water and Energy and a permit holder which may not be

⁵⁰⁴ Article 86(6) of the Ethiopian Constitution provides to seek and support peaceful solutions of international disputes, while Part XXVIII(i)(d) of its Ugandan counterpart offers a foreign policy based, among other things on the principle of settlement of international disputes by peaceful means. See Ethiopian Constitution, *supra* note 67.

⁵⁰⁵ The Ministry may designate such power to regional water bureaus or River Basin Organizations. *Ethiopian Water Resources Management Proclamation*; *supra* note 259, Article 9(1).

⁵⁰⁶ *Id.*

⁵⁰⁷ *Id.*

resolved through negotiations,⁵⁰⁸ can be determined through arbitration.⁵⁰⁹ The arbitration procedures set out under the Ethiopian Water Resources Management Regulation and⁵¹⁰ the Ethiopian Civil Code can be used in order to facilitate the outcome of the dispute settlement.⁵¹¹ With regard to international disputes involving Ethiopia and other riparian States, the Ethiopian water resources management policy and the constitution encourage the settlement of international disputes in accordance with international norms and conventions accepted by Ethiopia.⁵¹² The international norms and conventions accepted by Ethiopia may include the obligations demanded under the CFA, which Ethiopia has ratified.

The Ministries of Water and Energy and Foreign Affairs are responsible institutions for addressing international water disputes which may arise between Ethiopia and other countries. The settlement of disputes are handled through negotiations or by seeking the involvement of third parties, as it has been the case in the current dispute between Ethiopia and Egypt and Sudan over the Grand Renaissance Dam.

The Federal Government is responsible for international disputes as an exercise of a sovereign power to determine the administration of utilization of the waters or rivers and lakes linking two or more States or crossing the boundaries of the national territorial jurisdiction.⁵¹³ The discretionary role of the government can support the implementation transboundary dispute settlement mechanisms under the CFA.

4.11.2 Dispute Settlement in Uganda

508 Id., Article 9 (3).

509 Id., Article 9 (4).

510 *Ethiopian Water Resources Management Regulations*, supra note 314, Article 35-36.

511 Id., Article 35 (1) (e); Article 36 (4).

512 *Ethiopian Water Policy*, supra note 230, at 15.

513 *Ethiopian Constitution*, supra note 62, Article 55 (2) (a).

The recent transboundary disputes between Uganda and its riparian neighbours have taken a new dimension with the discovery of oil under Lake Albert, which may become more contentions over the rights to use its resources.⁵¹⁴ The type of water disputes in Uganda included disputes between uses and users as demand and competition over domestic water supply, livestock, industry, hydropower generation, agriculture, marine transport, fisheries, waste discharge, tourism, and environmental conservation.⁵¹⁵ The decline of fish stock in the Lake Victoria has affected essential income and food security of the communities exclusively dependent on fishing and the fish trade, and has increased the conflict between lakeshore communities in Uganda and the neighbouring State of the Democratic Republic of Congo.⁵¹⁶ The new disputes over their border can jeopardize the livelihoods of the locals,⁵¹⁷ and harm existing transboundary water cooperation unless appropriate dispute settlement mechanisms are put in place.

The existing mechanisms for the settlement of disputes over natural resources in Uganda can be discerned from a number of national legislations and policy principles. The 1998 Ugandan Land Act sets institutions for land dispute settlement, known as Land Tribunals, which operate at sub-county and district levels.⁵¹⁸ Members of the Tribunals are appointed by the Chief Justice. The Land Act transfers all lower-level land cases from local Council Courts

514 Rugadia, M. A., 'Countering regional, National and Local Conflict Impacts of Oil Discoveries in the Albertine Rift Uganda', A Report of a Qualitative Field Survey in 5 Districts, available at http://www.oxfam.org.uk/resources/learning/landrights/downloads/impact_of_oil_discoveries_in_uganda.pdf, accessed on 05 December 2011.

515 Id. World Water Assessment Programme, Case Study, National Development Report, Uganda, 2nd UN World Water Development Report, 'Water, a shared responsibility', (2006), available at <http://unesdoc.unesco.org/images/0014/001467/146760e.pdf>, accessed on 06 December 2011.

516 Westerkamp, M. & Houdret, A., 'Peace building across Lake Albert: Reinforcing environmental cooperation between Uganda and the Democratic Republic of Congo', Initiative for Peace Building, (2010), available at http://www.initiativeforpeacebuilding.eu/pdf/peacebuilding_lake_albert.pdf, accessed on 06 December 2011.

517 Cocks, T., 'Fishermen caught in oil dispute over African lake', Reuters, Nov 8, 2007, available at <http://www.reuters.com/article/2007/11/08/environment-oil-hundred-lake-dc-idUSL0560946820071108>, accessed on 06 December 2011.

518 *The Land Act*, 1998, Date of commencement: 2nd July 1998.

and Magistrates Courts to the Tribunals with immediate effect.⁵¹⁹ The Act also provides for the establishment of Parish Land Committee whose primary function is to receive, assess and grant or refuse applications for certificates of customary ownership as well as to provide the first stage in the hearing and resolution of any disputes relating to land which is the subject of an application for a certificate of customary tenure.⁵²⁰

Hunt argues that the abolition of the role of existing lower level courts in hearing land disputes was not supported by ‘the necessary provisions for activation of the new tribunals under the Act creating a hiatus in dispute resolution.’⁵²¹ Coupled with financial constraints and lack of capacity, the system has become dysfunctional, with a growing backlog of unsettled disputes.⁵²² Although it might seem difficult to establish direct linkages between the Land Act and the CFA provision on dispute settlement, the institutional mechanism under the act may provide some opportunity in resolving transboundary issues, such as land investment.

The National Water Policy gives village elders and the local chiefdoms an important role in the mediation of water disputes; a recognition of traditional and customary practice in the settlement of water disputes.⁵²³ The local council structures, including local council Courts are also responsible for the settlement of disputes arising among individuals and groups regarding access to water resources and abstractions that do not require permits.⁵²⁴ At the local levels, recourse to an administrative and judicial appeal is handled by District Water Committees or Magistrate Courts.⁵²⁵ However, a final administrative appeal could also be

519 Id., See Sections 75-89.

520 Id., Sections 6-8.

521 Hunt, D., ‘*Unintended Consequences of Land Rights Reform: The Case of the 1998 Uganda Land Act*’, 22 Devt Policy Rev., (2004) at 186.

522 Id.

523 *The Republic of Uganda, A National Water Policy, Ministry of Water, Lands and Environment* (1998), at 4.4 (vii), available at http://www.mwe.go.ug/index.php?option=com_docman&task=cat_view&gid=80&Itemid=122, accessed on 07 December 2011.

524 Id.

525 Id.

made to the Minister responsible for water, while an appeal channel through judicial system is available as an alternative mechanism.⁵²⁶

The dispute resolution mechanisms in both the Ugandan and Ethiopian legal systems afford little procedural rules for the resolution of water disputes. The Ugandan system provides local mechanisms, such as local council structures and local council Courts for the settlement of disputes pertaining to water abstractions that do not require permits. The system provides some structure regarding disputes between permit holders through negotiations, arbitration and compensation.

Both systems allow judicial recourses to parties that may not be satisfied with administrative decisions; although in the case of Ethiopia such right is restricted to a permit holder. The Ugandan experience provided successful cases in reversing decisions by government organs with regard to transboundary water, while such experience was not seen in the Ethiopian case; mainly due to the lack of proper laws allowing smooth legal process.

The implementation of the CFA procedures on disputes settlement, may, thus, require both the adoption of protocols by the future NRBC and the strength of its mandates over disputes resolution, while corresponding national laws must be consolidated to match the CFA requirements and the procedures to be developed by the NRBC.

4.12 Conclusion

The analysis of the Ethiopian and Ugandan case studies clearly showed that national laws and policy considerations put in place can support the CFA provisions on procedural issues. However, despite the plurality of existing national legislations, there are no explicit provisions on transboundary data and information exchange, prior notification on planned measures or dispute settlement. In both Uganda and Ethiopia the jurisdiction over water

⁵²⁶ Id.

issues is dispersed among several ministries and agencies. Thus, the lack of coordination and disbursed responsibilities on issues pertaining to hydrological, meteorological, environmental, hydropower, industrial, sanitation, and public health makes data compilation and analysis for generating readily available data and information more complicated.⁵²⁷

Lack of mechanisms for the dissemination of data and information requires effective storage media, with accessibility, retrieval in digitized and publication formats.⁵²⁸ Capacity building and technological imperatives can enhance cooperation in discharging the duty of data and information sharing, which in turn requires legal and institutional framework with proper mandates and responsibilities.

Public participation has also been examined in this chapter within the remits of statutory laws in Ethiopia and Uganda. The analysis has shown that both constitutional and other statutory provisions incorporated the right to public participation, which also are in consonant with the spirit of the principles of the CFA. However, lack of supportive legislative mechanisms for their smooth implementation can be obstacle to the involvement of national and trans-frontier communities and states in the implementation of transboundary projects, which might adversely affect them.

⁵²⁷ Gills, G., et al, '*Water Resources Data and Information Requirements in the Nile River Basin*', Proceedings, Vth Nile 2002 Conference, Addis Ababa, Ethiopia, February 24-25, 1997, at 140. (The Ministry of Water and Energy, Ethiopia).

⁵²⁸ Saghayroon and Osman El Tom, '*Advancement in collection, analysis and dissemination of Water Resources Data*', Proceedings, Vth Nile 2002 Conference, Addis Ababa, Ethiopia, February 24-25, 1997, at 193. (The Ministry of Water and Energy, Ethiopia).

CHAPTER 5

THE INSTITUTIONAL ASPECT- LEGAL MANDATES (ROLES AND RESPONSIBILITIES) IN ETHIOPIA AND UGANDA

5.1 Introduction

There is no complete agreement on the definition of the term ‘institution’, as its meaning varies in scope and context.⁵²⁹ The use of the term institution ‘has become widespread in the social sciences in recent years, reflecting the growth in...economics and...several other disciplines, including philosophy, sociology, politics, and geography.’⁵³⁰ A broader definition of the term ‘institution’ refers to rules governing behaviour in the decision making process, or more narrowly as political structure.⁵³¹ Institution within the context of water resources discussed in this thesis, ‘establishes the conditions under which water resources can be developed and used and provides organizations and individuals with certain resources and authorities to carry out prescribed tasks.’⁵³² In addition, the term institution in the context of this research can also refer to organizations construed as structures of recognized and accepted roles.⁵³³ Therefore, this research seeks to adopt a restricted definition of institutions, focusing more on the organisations and actors in the context of water resources management.

An institutional framework which enables discharging responsibilities concerning the legal aspects of water management is indispensable for the implementation of water resources

⁵²⁹ Irving Fox referred to ‘institution’ as involving, entities and organizations, individuals, rules, laws, regulations, or established custom. See Fox, I.K., ‘*Institutions for Water Management in a Changing World*’, 16 *Natural Resources J.*, (1976) at 743. According to Alan Wells, “Social institutions form an element in a more general concept, known as social structure.” See Wells, Alan, ‘*Social Institutions*’, London: Heinemann, (1970) at 3.

⁵³⁰ Hodgson, G. M., ‘*What Are Institutions?*’ 1, *Journal of Economic Issues*, (2006) at 1.

⁵³¹ Ostrom, E., ‘*An Agenda for the Study of Institutions*’, 48 *Public Choice*, (1986) at 3-4.

⁵³² Id.

⁵³³ Bandaragoda, D.J., ‘*A Framework for Institutional Analysis for Water Resources Management in a River Basin Context*’, (2000) at 4-5.

management policy.⁵³⁴ Water policies, legislation and regulations in many countries incorporate institutions for water resources management authorizing government agencies with mandates over water allocation, supervision and enforcement provisions.⁵³⁵ The examination of domestic water resources management institutions in countries such as Ethiopia and Uganda cannot be comprehended as pure organizational structures; rather it is an all-inclusive development of entities setting and defining rules formalized in terms of law, policy, environment and administrative arrangements.⁵³⁶

This chapter seeks to provide analysis on mandates and responsibilities of the water sector authorities and the inter-sectoral coordination of national institutions in Ethiopia and Uganda. In addition, it looks into the degree of interface mandates of the NRBC with the sub-basin and national institutions in order to implement the commitments under the new CFA. The case studies will explore the existing institutional architecture in Ethiopia and Uganda in order to seek their relevance in advancing the implementation of CFA and supplementing the mandates of the NRBC.

5.2 The Imperative of Institutional Coordination in Transboundary Water Management

Neither the implementation of a large number of existing international watercourse treaties between watercourse states nor rules of general international law governing international watercourses can be achieved ‘without a mechanism for on-going communication between the countries concerned, such as a joint commission.’⁵³⁷ The function of joint basin

⁵³⁴ Caponera, D. A., *‘Principles of Water Law and Administration: National and International’*, A.A. Balkema, Rotterdam, (1992) at 169.

⁵³⁵ Salman, M.A., and Bradlow, D.D., *‘Regulatory Frameworks for Water Resources Management: A comparative Study’*, Law, Justice, and Development Series, The World Bank, (2006) at 152.

⁵³⁶ Saleth, M., and Dinar, A., *‘Institutional changes in global water sector: trends, patterns and implications’*, 2 Water Policy, (2000) at 176.

⁵³⁷ McCaffrey, S., *‘The Coming Fresh Water Crises: International Legal and Institutional Responses’*, 21 Vt. L. Rev., (1996-1997) at 815.

commissions or any similar organization cannot be realized without coherent institutional coordination at national and international levels.⁵³⁸

According to Mumme, the International Boundary and Water Commission between Mexico and United States represents a good example of functional cooperation in transboundary resources management for ‘cooperative solutions to... the allocation of water, the division of disputed territories, and the management of a range of problems arising from contiguous development along their common boundary.’⁵³⁹

The evolution of highly advanced and resilient institutions of integrated water resources management in many developed countries has gone through decades of gradual change.⁵⁴⁰ In many developing countries, the assumption that the establishment of basin organisations will result in an integrated river basin management is refuted on the grounds that IWRM is more than a mere formation of a basin organization.⁵⁴¹

One of the important factors that influence institutional reform in the water sectors is the international commitments the countries are required to implement.⁵⁴² According to international relations scholars, international rules and norms can affect the domestic laws and policies through appeal by government officials and interest groups keen to advance their objectives at a national platform through such international rules or norms.⁵⁴³ Thus,

⁵³⁸ Id.

⁵³⁹ Mumme, S., ‘*Innovation and Reform in Transboundary Resource Management: A Critical Look at the International Boundary and Water Commission, United States and Mexico*’, 33 Nat. Resources J., (1993) at 93-94.

⁵⁴⁰ Shah, T., *Limits to Leapfrogging: Issues in Transposing Successful River Basin Management Institutions in the Developing World*, in Abernethy, C. L., (ed.), ‘Intersectoral Management of River Basins’, International Water Management Institute (IWMI), Proceedings of an International Workshop on Integrated Water Management in Water Stressed River Basins in Developing Countries: Strategies for Poverty Alleviation and Agricultural Growth’, Loskop Dam, South Africa, 16-21 October, 2000, at 89. Available at <http://www.lk.iwmi.org/Test/CD/pub/pubs/Loskop/loskop.pdf#page=110>, accessed on 24 September 2011.

⁵⁴¹ Id., at 91.

⁵⁴² Id.

⁵⁴³ Cortel, A., ‘*How Do Institutions Matter? The Domestic Impact of International Rules and Norms*’, 40 Int’l Studies Quarterly, (1996) at 451.

examination of domestic institutional systems will help to ascertain the extent of support for international treaty commitments.

5.3 Background: Institutional Development in Ethiopia

The history of development of water resources institutions in the Nile Basin countries varies in evolutionary context, scope and the reasons driving the architectures of the institutions themselves. The British colonial period has played a crucial role in the development of modern institutions in many Nile basin countries; in particular in Egypt and Sudan, due to Britain's economic and political interests.⁵⁴⁴ Egypt is an example of institutional history of the Nile, where centuries' strong institutional structures enabled it to hold a dominant position over the whole basin as compared to the weak national institutions in the rest of the Nile basin, including in Ethiopia and Uganda. The Ministry of Irrigation and Water Resources in Egypt evolved not only as institution responsible for the development and operation of its irrigation systems, but Nile control and hydraulic research.⁵⁴⁵

In the Ethiopian case, despite its ancient semi-ecclesiastical law of the Fetha-Negest containing rules governing water use, conservation and protection, there had been no modern institutional structures until the mid-1950s.⁵⁴⁶ Up until recently, the water sector was not a priority in the country's economic development, compared to industrial, transport and communication sectors.⁵⁴⁷ This state of affairs sustained a perpetual subsistence agricultural

⁵⁴⁴ Tvedt, T., *About the Importance of Studying the Modern History of the Countries of the Nile Basin in a Nile Perspective*, in Tvedt, T. (ed.), 'The River Nile in the Post-Colonial Age: Conflict and Cooperation among the Nile Basin Countries', I.B/TAURIS, London, (2010), at 6.

⁵⁴⁵ Abdel Mageed, Y., *The Nile Basin: Lessons from the Past*, in Biswas, A. B., (eds.) 'International Waters of the Middle East from Euphrates-Tigris to Nile', Water Resources Management Series, Oxford University Press, (1994) at 175.

⁵⁴⁶ See Abba Paulos Tzadua, *the Fetha-Negest, the Law of the Kings*, Strauss, P.L., (ed.), available at <http://www.cap-press.com/pdf/1888.pdf>, accessed on 11 December 2011.

⁵⁴⁷ Henze, P. B., *'Layers of Time: A History of Ethiopia'*, Hurst & Company, London, 2nd impression (2001), at 270.

economy based on primitive means of production and scattered small plots unsuitable for modern agricultural technology.⁵⁴⁸

The oldest formal natural resource institution in Ethiopia is the land tenure, which for a long time had been under the feudal system.⁵⁴⁹ The system was considered an impediment to a modern institutional development. Following the overthrow of the monarchy, rural land was nationalized, although it failed to bring in the required transformation in the agriculture, mainly because of continued subsistence peasant agriculture, and most importantly, the prohibition of private investment.⁵⁵⁰ Despite these facts, however, water administration became more prominent during the period, bringing in the advent of modern institutional development.

5.3.1 Modern Institutional Development

The first organ of the water administration known as the ‘Department of Water Resources’ was established in 1956 under the Ministry of Public Works, following the issuance of the Revised Constitution of 1955, which imbued the Government with a trust for the protection of natural resources, including water resources.⁵⁵¹ The creation of the Department was also a response to the negotiation between Egypt and Sudan at the time over the 1959 Nile Water Treaty, in which the two countries agreed to utilize the total waters of the Nile River, without consulting the major contributor; Ethiopia. The treaty also led Ethiopia to sign an agreement with the United States for ‘the USA-Ethiopia Cooperative Programme for the Study of the

⁵⁴⁸ Redden, K.R., *‘The Legal System of Ethiopia’*, the Michie Company Law Publishers, (1968) at 7.

⁵⁴⁹ Rahmato, D., *‘Agrarian Reform in Ethiopia’*, Scandinavian Institute of African Studies, Uppsala, Motala Grafiska AB, Motala (1984) at 16.

⁵⁵⁰ Jemma, H., *‘the Politics of Land Tenure in Ethiopian History: Experience from the South’*, Paper Prepared for XI World Congress of Rural Sociology, Trondheim, Norway, July 25-30, 2004. Available at <http://www.irsaworld.org/prior/XI/papers/4-6.pdf>, accessed on 5th October 2011.

⁵⁵¹ Olana, B., *‘The Development and Evolutionary Arrangements for Water Resources Management in Ethiopia’*, Paper presented at FAO Nile Basin Project, National Capacity Building Workshop, Adama, Ethiopia, August 2001. (Copy with the author).

Blue Nile Basin' and accelerate the establishment of a pertinent organ for its realization.⁵⁵² It was the emergence of this Department which later resulted in the materialization of consecutive institutions over the last five decades.⁵⁵³

The Awash Valley Authority was among the first modern water institutions with mandates of water planning, development and operation as well as water rights administration.⁵⁵⁴ The scope of its mandate which was confined to the Awash River basin included the supervision of agro-industrial and hydroelectric enterprises in the Awash River Valley.⁵⁵⁵

The National Water Resources Commission (NWRC) was established in 1971⁵⁵⁶ and reconsolidated its mandate in 1981 by taking over all the powers and responsibilities of all water resources institutions.⁵⁵⁷ One of the organizations under the auspices of the Commission was the Water Resources Development Authority, which was responsible for conducting studies for the utilization, administration, regulation, protection and allocation of inland waters and the supervision of government water policies and plans.⁵⁵⁸ Other institutions which also came under the Commission included, the Water Supply and Sewerage Authority, which was responsible for urban and rural water supply and sewerage services and the National Meteorological Services Agency.⁵⁵⁹ However, a parallel organ, the

⁵⁵² Zewde G. S., 'The Nile River Question in a New Era of Cooperation Among Riparian States', Proceedings of the VIIth Nile 2002 Conference, Addis Ababa, Ethiopia, June 26-29, (2000) at 524. (Copy with the author).

⁵⁵³ *Historic Evolution of the Water Sector, Federal Democratic Republic of Ethiopia, Ministry of Water and Energy*, available at <http://www.mowr.gov.et/index.php?pagenum=1.2&pagehgt=1080px>, accessed on 15 October 2011.

⁵⁵⁴ General Notice No. 299 of 1962, *Awash Valley Authority Charter*, Imperial Ethiopian Government, Addis Ababa, (1962).

⁵⁵⁵ Bahru Zewde, 'A History of Modern Ethiopia: 1855-1974', first published 1991, (2000) at 194.

⁵⁵⁶ Order No. 75 of 1971 of the *Imperial Ethiopian Government to establish the National Water Resources Commission*. See also *Historic Evolution of the Water Sector, Federal Democratic Republic of Ethiopia, Ministry of Water and Energy*, available at <http://www.mowr.gov.et/index.php?pagenum=1.2&pagehgt=1080px>, accessed on 15 October 2011.

⁵⁵⁷ Proclamation No. 217/1981, *A Proclamation to provide for the establishment of the National Water Resources Commission*, the Provisional Military Administrative Government, (1981).

⁵⁵⁸ Proclamation No. 218/1981, *Water Resources Development Authority Establishment Proclamation*, Provisional Military Administrative Government, Addis Ababa, (1981).

⁵⁵⁹ Proclamation No. 219/1981, *Water Supply and Sewerage Authority Establishment*, Provisional Military Administrative Government, Addis Ababa, (1981).

Ethiopian Valleys Development Authority had been created in 1989 with a number of mandates, some of which were already attributed to the Commission.⁵⁶⁰ Some of the mandates of the Authority were, to conduct studies; initiate policy; prepare directive pertaining to the utilization of transboundary rivers; conduct development and implementation of valleys master plan studies; and carry out research pertaining to environment and irrigation.⁵⁶¹

The first organ at ministry level, (the Ministry of Natural Resources Development and Environmental Protection) was established in 1993 with the mandate to formulate policies and strategy regarding the country's natural resources development and environmental protection.⁵⁶² The Ministry had played a vital role in the signing of a framework for general cooperation and bilateral cooperation with Egypt⁵⁶³ and Sudan respectively.⁵⁶⁴ The declaration and establishment of Ethio-Sudan Technical Committee signalled a more forthcoming Ethiopian attitude towards cooperation and institutions.⁵⁶⁵

5.4 Background: Institutional Development in Uganda

The traditional institutional system in Uganda was characterized by a centralized administration under well-established Kingdoms.⁵⁶⁶ Unlike the development in its Ethiopian counterpart, whose administrative system escaped colonial influence, the colonial administration in Uganda had been able to dismantle or modify pre-colonial institutions in

⁵⁶⁰ Proclamation No. 318/1987, *A Proclamation to Provide for the establishment for the Ethiopian Valleys Development Studies Authority*, Addis Ababa, Ethiopia, (1987).

⁵⁶¹ Article 6 (1-14).

⁵⁶² The Ministry of Natural Resources and Environmental Protection, Proclamation No. 41/1993, *A Proclamation to define the Powers and Duties of The Central and Regional Executive Organs of The Transitional Government of Ethiopia*, (1993).

⁵⁶³ *Framework for General Cooperation between the Arab Republic of Egypt and Ethiopia*, 1st July 1993, International Fresh Water Treaties, available at <http://ocid.nacse.org/tfdd/tfdddocs/521ENG.pdf>, accessed on 13 December 2011.

⁵⁶⁴ Ethio-Sudan Peace and Friendship Khartoum Declaration, 23 December 1991.

⁵⁶⁵ Shapland, G., 'International Water Disputes in the Middle East: Rivers of Discord', First published in the United Kingdom, by C. Hurst & Co. (Publishers), Ltd., (1997) at 81.

⁵⁶⁶ Morris, H.F. & James, S.R., '*Uganda: The Development of its Laws and Constitution*', Stevens & Sons, London, (1966) at 5.

Uganda, while establishing new arrangements based on foreign legal, administrative and physical frameworks at the same time.⁵⁶⁷

Decentralization was introduced under the 1962 post-independence constitution granting a federal administration to the semi-federal status to the kingdoms as a justification for people's empowerment.⁵⁶⁸ The local administration was derailed with the abrogation of the constitution in 1966 and its replacement by a new constitution, which established a centralized system of government.⁵⁶⁹ The emergence of successive military regimes brought further setbacks to the re-establishment of the decentralized institutions to the country.⁵⁷⁰

5.4.1 Modern Institutional Development

A favourable ground for decentralization and responsibilities of the state concerning water resources was first laid down in the 1993's Resistance Council's Statute and the 1995 Constitutions.⁵⁷¹ According to studies, Uganda has taken active measures in rehabilitating its water sector and establishing a comprehensive institutional framework for the management and development of the country's water resources.⁵⁷² The water sector reform was part of overall national initiatives in the spheres of decentralization, privatization, gender equality where the roles of different levels of government institutions were redefined.⁵⁷³

The 1995 Water Statute contained a range of provisions; among them, institutional mandates of water and sewerage authorities and the devolution of water supply and sewerage

⁵⁶⁷ *The Report of the Uganda Constitutional Commission and Recommendations*, iii, (1993), available at <http://heinonline.org>, accessed on 8 October 2011.

⁵⁶⁸ Mugabi, E., 'Uganda's Decentralization Policy, Legal Framework, Local Government Structure and Service Delivery', Paper prepared for the First Conference of Regional Assemblies of Africa and Europe organised by the Regional Assembly of Tuscany under the patronage of the Italian Presidency and the United Nations Department of Economic and Social Affairs (UNDESA). September 17 to 18, 2004. Florence, Italy.

⁵⁶⁹ Id.

⁵⁷⁰ Id.

⁵⁷¹ *Republic of Uganda, Country Paper, Towards Integrated Water Resources Management*, Proceedings, Vth Nile 2002 Conference, Addis Ababa, Ethiopia, February 24-28, 1997 at 74.

⁵⁷² *Case Study, Uganda, National Water Development Report, Uganda*, Prepared for the 2nd World Water Development Report 'Water, a Shared Responsibility', (2006) at 17. Available at <http://unesdoc.unesco.org/images/0014/001467/146760e.pdf>, accessed on 25 October 2011.

⁵⁷³ Id.

undertakings as part of the evolving complex power relationship in the institutional building of the water sector.⁵⁷⁴ One of the objectives of the Statute has been institution building in the emerging water sector, through ‘co-ordination, allocation and delegation of responsibilities among Ministers and public authorities for the investigation, use, control, protection, management or administration of water resources.’⁵⁷⁵ The Ministry of Water and Environment and the Directorate of Water have statutory powers regarding the limitations on the use of water; discretion to delegate their mandates, with the exception of some of those powers which are considered the exclusive prerogative of the Ministry; carrying inventory of water resources; water supply and sewerage, and waste management.⁵⁷⁶ However, unlike the Ethiopian system, a more liberal system for private sector and local participation in Uganda provide a system of institutional checks and balances on the State’s absolute right to water administration.

Private sector participation is responsible for the introduction of technical, financial and managerial expertise has greatly improved the performance of the water sector; in particular, the development and management of urban water and sanitation services.⁵⁷⁷ Moreover, ‘the introduction of private operators in the management of small town water supplies has attracted the necessary technical expertise and also significantly reduced the government burden in subsidizing town water supply.’⁵⁷⁸ The 1997 Water Act is another important piece of legislation which incorporates institutional functions of water and sewerage authorities.

5.5 The institutional structure of the Nile Basin Commission (NRBC)

⁵⁷⁴ See, *The Water Statute*, supra note 260, Articles 45-47.

⁵⁷⁵ Id., Article 4(III).

⁵⁷⁶ Id. See Part II, Division I.

⁵⁷⁷ National Water Development Report: Uganda 2nd UN World Water Development Report, ‘*Water, a shared responsibility*’, (2006).

⁵⁷⁸ Id.

The institutional structure of the Nile Basin Commission (NRBC) under the CFA is comprised of:

- (a) Conference of Heads of State and Government
- (b) Council of Ministers
- (c) Technical Advisory Committee
- (d) Sectoral Advisory Committees
- (e) Secretariat

The Conference of the Heads of State and Government is the supreme policy making organ of the Commission.⁵⁷⁹ The Council of Ministers is the governing body, and is responsible for the effective implementation of the Framework Agreement the final decision for determination of equitable utilization in each riparian country according to the criteria set in the CFA.⁵⁸⁰

The Technical Advisory Committee (TAC) is the technical and administrative arm of the Council of Ministers.⁵⁸¹ It makes recommendations on the overall issues of implementation of the CFA. The structure of the NRBC includes sub-basin organizations. Most importantly, the CFA requires each Basin State to establish or designate a National Nile Focal Point Institution that serves the NRBC to deal with matters within the competence of the Commission, or in other words, the implementation of the NRBC's mandates at the national level.⁵⁸²

5.6 The institutional structures and the extent to which the national agencies in Ethiopia are mandated with implementing the CFA

5.6.1 The Ministry of Water Resources (MoWR)

The Ministry of Water Resources of Ethiopia, which was established as a Federal institution is responsible for the management of the country's water resources, was the authority to

⁵⁷⁹ Id., Article 21.

⁵⁸⁰ Id., Article 22.

⁵⁸¹ Id. Articles 25, 26 and 27.

⁵⁸² The CFA, Article 33, *supra* note 45.

determine conditions and methods required for the optimum utilization of inter-state waters.⁵⁸³ The Ministry undertakes studies regarding transboundary water resources, with additional special mandate for negotiating transboundary water treaties and following up their implementation through the focal point; the Department for Boundary and Transboundary Rivers Affairs.⁵⁸⁴

5.6.2 The Ministry of Water and Energy (MoWE)

The MoWR was restructured in 2010 and renamed as the Ministry of Water and Energy (MoWE); the new structure retains all the MoWR's powers and responsibilities.⁵⁸⁵ Its main responsibilities included, undertaking of basin studies; determining the country's ground and surface water resource potential in terms of volume and quality; and facilitating the utilization of same.⁵⁸⁶ One of the important mandates of the Ministry included the power to determine conditions and methods required for the optimum and equitable allocation and utilization of water bodies that flow across or lie between two or more regional states among various uses and the regional states.⁵⁸⁷ The inclusion of the principle of equitable utilization, though within inter-state water can be seen as an important aspect of the redefinition of powers and responsibilities of the Ministry.

The Minister of Water and Energy is a member of the Council of Ministers of the NRBC, and therefore, will be responsible for the implementation of the CFA at the national level. The Ministry can be the focal point for the implementation of substantive and procedural principles, such as the equitable utilization and data and information exchange as required

⁵⁸³ *The Ministry of Water Resources, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, Proclamation No. 4/1995, Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia, 1st Year No. 4, Addis Ababa, 23rd August 1995*, Article 17 (1) and (5).

⁵⁸⁴ *Id.*, Articles, 17 (5) and (8); The Directorate is responsible for overall transboundary water negotiations and implementation. See Mandates of Key Directorates, MoWE (copy with the author).

⁵⁸⁵ *Ministry of Water and Energy, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, A Proclamation No. 691/2010, A Proclamation to Provide for the Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia, Addis Ababa, (2010).*

⁵⁸⁶ *Id.*, Article 26 (1) (a and b).

⁵⁸⁷ *Id.*, Article 26, (1), (c).

under the CFA. The institutional capacity for implementing the CFA can be supported by the national laws; mainly, the Ethiopian Water Resources Management Policy,⁵⁸⁸ the Ethiopian Water Resources Management Proclamation⁵⁸⁹ and the Ethiopian Water Resources Management Regulation.⁵⁹⁰ The capacity is further enhanced by executive organs in the form of authorities and agencies, which are accountable to the Ministry of Water and Energy; among them, the River Basin High Councils and Authorities.⁵⁹¹ The High Council and Authorities has the duty to provide information and advisory support to the MoWE on transboundary water issues.⁵⁹² The institutional capacity is also strengthened by the collective mandate of the Ministry of Water and Energy as a member of the Council of Ministers and the Technical Advisory Committee (TAC) under the CFA.

5.6.3 River Basin High Councils and Authorities: Abbay River Basin Authority

The Awash Basin Water Resources Administration Agency established in 1998 with the objective of the control and administration of the Awash River Basin.⁵⁹³ The Abbay (Blue Nile) River Basin Authority (ARBA), which was established in 2008, has as its main objective the promotion and monitoring of the ‘implementation of integrated water resources management process in an equitable and participatory manner in the Abbay basin.’⁵⁹⁴ It is one of the relevant national institutions which can support the implementation of the CFA.⁵⁹⁵ The MoWE as a focal point for national implementation of the CFA-NRBC mandates will have to rely on some specific functions of the Authority that directly impact transboundary water

⁵⁸⁸ Water Resources Management Policy, *supra* note 230.

⁵⁸⁹ Ethiopian Water Resources Management Proclamation, *supra* note 242.

⁵⁹⁰ Ethiopian Water Resources Management Regulation, *supra* note 314.

⁵⁹¹ *River Basin Councils and Authorities Proclamation*, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, Proclamation No. 534/2007.

⁵⁹² *Id.*, Article 6 (7).

⁵⁹³ *Awash Basin Water Resources Administration Agency*, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, Proclamation No. 129/1998, *Awash Basin Water Resources Administration Agency Establishment Proclamation*.

⁵⁹⁴ *Abbay Basin High Council and Authority*, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, Regulation No. 151/2008, Council of Ministers Regulation to Establish Abbay, Basin High Council and Authority.

⁵⁹⁵ *Id.*, Article 3.

resources; mainly, the preparation and provision of necessary information for its negotiations with other countries concerning transboundary river basins.⁵⁹⁶

5.6.4 Regional Water Bureaus

Regional States are mandated to establish their corresponding institutional structures at different administrative levels.⁵⁹⁷ According to Tamrat, the decentralized system of government is intended for a proper management of natural resources including water resources.⁵⁹⁸ The decentralization of the water sector has both a political aspect. Politically decentralization serves the objective of the Federal system of self-governance. It is part of empowerment of the Regional Governments to administer their affairs, promulgate their constitutions and other laws and implement them through their own legislative, executive and judicial bodies.⁵⁹⁹ Therefore, the role of the regional state bureaus in providing information on transboundary water resources flowing through their own regional territories require closer coordination with the focal point institution responsible for the implementation of the CFA.

Figure 1 - Institutional Development - Ethiopian Water Sector

Water Resource Institutions	Period	Main Functions
The Awash Valley	1977-1988	Mandated to develop the Awash River

⁵⁹⁶ Id., Article 11.

⁵⁹⁷ The 'structures of self-governance within the lower levels of the states such as the Woreda (Districts, Kebele (which is the smallest unit of administration) and sub-Kebele levels.' See Tamrat, E., 'Policy and Legal Framework for Water resources Management', paper presented at International Conference on Water Management in Federal and Federal-Type Countries, Zaragoza, Spain, 9th -11th July 2008. (Copy with the author).

⁵⁹⁸ Id.

⁵⁹⁹ Assefa, T. & Gebre-Egziabher, T., eds. *Decentralization in Ethiopia*, Forum for Social Studies, (FSS), Addis Ababa, (2007) at 1.

Development Agency (AVDA)		Basin
The Valleys Agricultural Development Authority (VADA)	1977-1981	Responsible for agricultural development in the entire basins
The Ethiopian Water Works Construction Authority (EWWCA)	1980-1992	Enjoyed regulatory power over national water works, issuing of permits. However, most of its powers were curtailed later.
Water Resources Development Authority (WRDA)	1981-1995	Administration, regulation, protection, and allocation of water resources
Water Supply and Sewerage Authority (WSSA)	1981-1995	Responsible for the provision of urban and rural water supply and sewerage services.
The Ethiopian Valleys Development Studies Authority (EVDSA)	1987-1995	Mandated to prepare policies and directives for water development. Responsible for transboundary Water resource issues.
The Ministry of Natural Resources Development and	1993-1995	Responsible for water and environmental matters

Environmental Protection		
The Ministry of Water Resources (MoWR)	1995-2010	Responsible for Planning and management of water resources, development of policies, strategies and programs, develop and implement water sector laws and regulations, conduct study and research activities, provide technical support to regional water bureaus and offices and sign international agreements.
The Ministry of Water & Energy (MoW&E)	current	The powers and duties of for MoWR on water and the Ministry of Mines and Energy on energy, as well as rural electrification from the Ministry of Agriculture and Rural Development and the Ethiopian Rural Energy Development and Promotion Centre, are transferred to the re-named MoWE.

5.7 The Problems of Coordination

Effective coordination is critical for maintaining the balance between political, environmental, economic and social values of water the satisfaction of various interests of the

actors involved.⁶⁰⁰ In a transboundary context, proper coordination between all levels of institutions is critical for the implementation of the CFA provisions at the national or local levels.

One of the hindrances to a sustainable transboundary mandates is the lack of smooth transition as a result of frequent institutional restructuring of the water sector following political changes. The outcome is the lack of institutional stability and policy predicament.⁶⁰¹ However, political changes can have positive impacts on institutional structure of the water sector with the introduction of the Federal system and the decentralization.⁶⁰²

The Federal Government has the power to determine the utilization of waters, rivers and lakes linking two or more regional States or crossing boundaries of the national territorial jurisdictions.⁶⁰³ The Ministry of Water and Energy, which is mandated with such powers can, ‘where necessary delegate its powers and duties to the appropriate body for efficient execution of its duties.’⁶⁰⁴ Regional bureaus are responsible for the administration of water resources in regional states. Their powers and duties include collecting data; supervising equitable distribution and utilization of the region’s water resources among various types of services.⁶⁰⁵ Linkage and coordination with regional bureaus can be of critical value in the implementation of the CFA, because the data collections and analysis on the transboundary rivers is to be collected at the lowest appropriate sub-basin levels within the regions by the

⁶⁰⁰ Butterworth, et al, ‘*Finding Practical Approaches to Integrated Water Resources Management*’, Water Alternatives, 3(1) (2010) at 74, available at http://www.water-alternatives.org/index.php?option=com_content&task=view&id=126&Itemid=1, accessed on 20 October 2011.

⁶⁰¹ *Ethiopian Water Resources Management Policy*, supra note 230, 2.1.1(14).

⁶⁰² Ayenew, M., A Rapid Assessment of Woreda Decentralization in Ethiopia’, in Assefa, T., & Gebre-Egziabher, T., (eds.), *Decentralization in Ethiopia*, (2007) at 69.

⁶⁰³ Federal Negarit Gazeta of the Federal Republic of Ethiopia, Proclamation No. 1/1995 *Constitution of the Federal Republic of Ethiopia*, (1995), Proclamation No. 1/1995, Article 51 (5 and 11).

⁶⁰⁴ Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, Proclamation No. 197/2000, *Ethiopian Water Resources Management Proclamation*, Article 8 (2).

⁶⁰⁵ *Amhara National State Water Resources Development Bureau*, available at <http://www.bowrd.gov.et/en/about-us/establishment.html?showall=1>, accessed on 22 October 2011.

regional bureaus or agencies operating within the basin be of importance to support the implementation of the CFA.

Existing practice shows that the mechanism of coordination between the Federal Ministry of Water and regional water sector institutions are indistinct as there is no direct organizational chain between the two entities and the accountability of regional bureaus lie within their respective regional States. Therefore, data and information flow from the regions cannot be anticipated as readily and regularly forthcoming; instead it requires the effort of Planning Department of the MoWE in data gathering, analysing and compilation in to a national data base. Moreover, a study on the current state of institutional capacity of the water sector shows that ‘the degree of decentralisation in the Ethiopian water sector is not sufficient to enable the lower tier of government to accomplish its functions.’⁶⁰⁶

In the Ethiopian context, ‘the mandates of different federal ministries regarding water management are still partly unsettled or unclear.’⁶⁰⁷ Although the MoWE is the key institution with the authority for the development of transboundary water resources and the implementation of the CFA, the issue cannot be within the absolute bound of a single institution; as other relevant line ministries, agencies, NGOs, and the private sector may have direct or indirect impact on the national implementation of transboundary water agreements.

For instance, the Ministry of Finance and Economic Development (MoFED) is responsible for the preparation of the country’s social and economic development plan and follow-up of

⁶⁰⁶ Arsano, et al, ‘*Governance and Drivers of Change in Ethiopia’s Water Supply Sector*’, A study conducted by the Organisation for Social Science Research in Eastern and Southern Africa (OSSREA) in collaboration with the Overseas Development Institute (ODI), (2010) at x, available at capacity4dev.ec.europa.eu/system/.../PEA_Water_Ethiopia.pdf, accessed on 14 December 2011.

⁶⁰⁷ Luzi, S., ‘*Double-Edged Hydropolitics on the Nile: Linkages between Domestic Water Policy Making and Transboundary Conflict and Cooperation*’, A Dissertation Submitted to the Swiss Federal Institute of Technology Zurich for the Degree of Doctor of Science, (2008) at 173.

its implementation.⁶⁰⁸ MoFED plays some role in the process of the implementation of transboundary water projects and programs. Its role in the implementation of the CFA requirements must be part of the national plans adopted by the Council of Ministers for the development of transboundary water resources at the national level.

The Ministry of Foreign Affairs (MoFA) oversees transboundary water negotiations within the scope of the Foreign Affairs and National Security Policy and Strategy.⁶⁰⁹ Its involvement in the process of negotiation of the CFA is considered important in the adoption of strategy and state positions and negotiation and settlement of disputes on specific issues. The MoFA serves as one of the members for the Nile-TAC and it closely monitors activities pertaining to the implementation of the CFA.

With regard to the question of mandate for concluding international watercourse treaties one can observe conflicting *defacto* and *de jure* practices. According to the 1995 proclamation, the MoWR had the power to ‘sign international agreements relating to transboundary rivers in accordance with the law.’⁶¹⁰ That mandate was limited to negotiating treaties pertaining to the utilization of boundary and trans-boundary water bodies, and follow up their implementation.⁶¹¹ Therefore, it can be assumed that, in the implementation of the CFA, the MoFA is legally competent to consult the follow up formalities for the ratification of transboundary water treaties in line with the MoWE. However, as displayed in practice, the statutory issues did not under value the role of the Minister of Water and Energy as the

⁶⁰⁸*The Ministry of Finance and Economic Development*, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, A Proclamation No. 691/2010, A Proclamation to Provide for the Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia, Addis Ababa, (2010).

⁶⁰⁹*The Federal Democratic Republic of Ethiopia Foreign Affairs and National Security Policy and Strategy*, Ministry of Foreign Affairs of Ethiopia, available at http://www.mfa.gov.et/Foreign_Policy_And_Relation/Basic_Principles_Foundation.php, accessed on 25 October 2011.

⁶¹⁰*The Ministry of Water Resources*, Federal Negarit Gazeta of the Federal democratic Republic of Ethiopia, Proclamation No. 4/1995, Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia, (1995).

⁶¹¹*The Ministry of Water Resources*, Proclamation No.471/2005. See also *The Ministry of Water and Energy*, Federal Negarit Gazeta, supra note 570, Article 26.

representative of the Ethiopian Government in negotiating the CFA and in adopting the text of a treaty, while the MoFA, which is a party to all such processes, continues to play a critical role in expressing the consent of the State to be bound by the agreement.

The CFA's implementation also needs the support of other institutions, such as, the Federal Democratic Republic of Ethiopia House of People's Representative (Parliament) and the Ethiopian Environmental Protection Authority, which are organs requiring coordination at the national and basin levels.⁶¹²

5.8 The institutional structures and the extent to which the national agencies in Uganda are mandated with implementing the CFA

A summary of the institutional reform agenda in the water sector provides a multitude of organs with mandates on the use, protection and preservation of the Ugandan water resources. Whether these mandates are sufficient enough to allow the implementation of commitments under the CFA can be determined by examining their respective duties and responsibilities.

i) The Ministry of Water and Environment (MoWE)

The duties and responsibilities of the Ministry of Water and Environment (MWE) include 'setting national policies and standards, managing and regulating water resources and determining priorities for water development and management.'⁶¹³ It also has the responsibility to monitor and evaluate 'sector development programmes to keep track of their performance, efficiency and effectiveness in service delivery.'⁶¹⁴ The Ministry of Water and Environment (MWE) is the central organ for development, management, monitoring and

⁶¹²*The Ministry of Federal Affairs*, Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia, A Proclamation No. 691/2010, A Proclamation to Provide for the Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia, Addis Ababa, (2010).

⁶¹³See Ministry of Water and Environment, the Republic of Uganda, available at http://www.mwe.go.ug/index.php?option=com_content&view=article&id=102&Itemid=145, accessed on 20 August 2011.

⁶¹⁴ Id.

evaluation of Uganda's water resources, including transboundary water resources. The Ministry is responsible for the implementation of the national policy pertaining to the Nile waters. One of the policy provision states: 'Equitable for Uganda's access and use of the Nile waters through effective involvement of Government in the Nile waters issues, to secure adequate water for Uganda's needs for today, and for the future.'⁶¹⁵ This policy principle can be useful in the national implementation of the CFA. The realization of CFA's commitment is further strengthened because of the role of the Minister of Water and Environment as a member of the Council of Ministers and a focal point for the NRBC.

ii) The Directorate of Water Resources Management (DWRM)

The Directorate of Water Resources Management has mandates that include initiating national water policies, national water laws and regulations.⁶¹⁶ It is also responsible for water use rights, water abstraction and wastewater management permits and the task of coordinating Uganda's participation in the joint management of transboundary waters resources with other riparian countries.⁶¹⁷ The implementation of the CFA and the mandates of the NRBC will specifically rest with the Directorate of Water Resources Management.

5.9 Institutional Coordination

Coordination and compliance with Government policy and legislation in the water sector and affiliated agencies for implementing programmes is set as the main strategic objective of water and sanitation development in Uganda.⁶¹⁸ The mechanism for sectoral coordination activities in Uganda puts in place the Water Policy Committees by established under the 1995 Water Statute and the 1997 Water Act.⁶¹⁹ Members of the Committee, which are appointed by the Minister of Water and Environment consist of Permanent Secretary responsible for water

⁶¹⁵ Id.

⁶¹⁶ Id.

⁶¹⁷ Id.

⁶¹⁸ *Government of Uganda, Ministry of Water and Environment, Strategic Sector Investment Plan for the Water and Sanitation Sector in Uganda*, Final, (July 2009) at 133, (on file with author).

⁶¹⁹ The Water Statute, *supra* note 260, Article 9. See also the Water Act, *supra* note 262.

resources; the Executive Director of the National Environment Management Authority; the director responsible for irrigation; the director responsible for animal industry and fisheries; the commissioner for industry; the commissioner for hydropower; a district council chairperson; a chief administrative officer; the managing director of the National Water and Sewerage Corporation; two persons having special qualifications or experience relevant to the functions of the Water Policy Committee; and the director of water development.⁶²⁰

The functions of the Water Policy Committee include the coordination of hydrological and hydrogeological investigations; preparation, implementation and amendment of the water action plan and making recommendation on the water action plan. The Committee may also provide advice on policy issues relevant to the investigation, use, control, protection, management or administration, water law review, amendments that may be required for the improvement or better administration of that law, and dispute settlement between water agencies.⁶²¹ The Committee has remained inactive due to a number of reasons; among them, lack of budget, staff, and the absence of private sector and NGO representatives, which might have acted as a catalyst in setting its functions in motion.⁶²²

There is a lack of solid inter-sectoral coordination on transboundary water resources management issues in Ethiopia. The Ministry of Water and Environment is the lead government organization entirely responsible for transboundary water resources issues, in particular, the negotiations of the CFA.

⁶²⁰ Id., Article 10

⁶²¹ Id.

⁶²² *Government of Uganda, Ministry of Water and Environment, Strategic Sector Investment Plan for the Water and Sanitation Sector in Uganda*, Final, (July 2009) at 156, (on file with author).

In Uganda, the Ministry of Foreign Affairs is responsible for the foreign policy, which ‘is the aggregation of the domestic policy projected into the international arena.’⁶²³ As the coordinator of all the domestic aspirations in the foreign environment, the Ministry of Foreign Affairs is, therefore, the relevant organ for intersectoral coordination regarding the implementation of the CFA. Other sectors requiring a close coordination are listed in the table below.

Table 2 – Institutions involved in the Ugandan water sector

Institution	Role
Ministry of Water, Lands and Environment	Policy formulation, setting standards, strategic planning, coordination, quality assurance, provision of technical assistance, and capacity building.
Ministry of Health	Promotion of hygiene and household sanitation
Ministry of Education and Sports	Promotion of sanitation and hygiene education in schools.
Ministry of Gender, Labour and Social Development	Coordination of gender responsive development and community mobilization.
Ministry of Agriculture, Animal Industries and Fisheries	Planning, coordination and implementation of all agriculture development in the country including irrigation development, aquaculture, and livestock development.
Local Governments	Responsible for the provision and management of water and sanitation services in rural areas and urban areas outside the jurisdiction of NWSC, in liaison

⁶²³ Ministry of Foreign Affairs, the Republic of Uganda, available at <http://www.mofa.go.ug/>, accessed on 19 August 2011.

	with DWD;
User Communities	Planning, implementation and operation and maintenance of the rural water and sanitation facilities. User communities are also obliged to pay for urban water and sanitation services provided by NWSC and other service providers.
Donors	Provide financial resources for implementation of water sector activities.
Private Sector	Valuable resource for design, construction, operation and maintenance of water and sanitation facilities. Conduct training and capacity building for both central and local government staff. Provision of other commercial services including mobilization of financial resources for water sector development activities.
Non-Governmental Organizations (NGOs) and Community Based Organizations (CBOs)	Supplement the public sector efforts and ensure that concerns of the underprivileged/poor are catered for. Provision of financial and planning support to communities and local governments.

5.10 A Summary of Comparative Analysis on Institutional Development and Coordination

Both the Ethiopian and Ugandan water sectors are led by the ministries of water, which are mandated for the management of transboundary water resources. The institutional instability observed in the Ethiopian water sector is rare under the Ugandan institutional system. Moreover, the decentralization of mandates operates in both systems, with different state structures, the Federal system in Ethiopia and Unitary system in Uganda. The institutional mandates are decentralized based on a well-structured system in Uganda and a Federal structure in Ethiopia. Institutional coordination is the most challenging issue among various institutions in both countries. In Ethiopia, the practice of coordination among various institutions is based on a case by case basis, rather than a systematic approach, while in Uganda the system in place is seldom put in to practice. Therefore, it is important to note that, while the exiting institutional structures offer a positive contribution towards the implementation of the CFA at the national level, the issues of effective coordination remain an issue that need due attention.

5.11 Conclusion

This chapter has examined mandates and responsibilities of the water sector authorities and the inter-sectoral coordination of national institutions in Ethiopia and Uganda. The thesis has identified challenges impeding institutional capacity for the implementation of international commitments, among them, the issue of institutional coordination with regard to regional and national commitment. Institutional coordination within the transboundary context requires the alignment of basin, sub-basin and national mandates. No less challenge has been observed in the problem of institutional instability, where frequent sectoral restructuring of the Ethiopian water sector may lead to the lack of institutional memory. The identification of problems and

the extent of gaps in national structures in this chapter can help to measure the extent of mandates of the national institutions in the implementation of the CFA.

CHAPTER 6

FINDINGS: NATIONAL LAWS AND INSTITUTIONS SUPPORTING OR HINDERING THE IMPLEMENTATION OF AND COMPLIANCE WITH INTERNATIONAL OBLIGATIONS

6.1 Introduction

The primary research question of this thesis was:

“How, and to what extent, do national laws and institutions support or hinder the implementation of and compliance with international obligations?” A combined analysis of international and national laws investigated the substantive and procedural principles under the CFA and the level of the support the national laws and institutions can offer in detailed case studies of the Ethiopian and Ugandan legal systems. This chapter will reflect on the framework by which the analysis of international (legal) commitments pertaining to the CFA and the national laws and institutions supporting or hindering their implementation can be of value to the combined study in the Nile and to other river basins.

6.2 General findings: the theoretical analysis

The general findings from the analysis in this thesis postulated a shift from the past study of international and national law as separate branches of law with no appreciation of their impact on each other, to the current reality, where the two legal systems should be considered jointly. The analysis by advancing knowledge and understanding of the relationship between international and national law has helped ascertain the links between national laws and institutions, and international principles under the CFA.

The international water law principles examined under the CFA in this research have drawn attention to the ultimate necessity of national implementation. Having provided a framework

and methodology to examine the links through case studies in Ethiopia and Uganda, the findings of this research are not exclusive to the Nile. As a generic framework, they could be applicable to other river basins or to other fields of international and national law.

6.3. General findings from the analysis under the CFA

This research has shown that international commitments pertaining to trans-boundary watercourses can be examined through concepts of scope, substantive norms, procedural rules, institutional arrangements and dispute settlement mechanisms. The substantive and procedural principles of international water law and institutions incorporated in the new framework agreement, can help to identify supportive laws within the national water policies, legislative provisions and institutional structures in Ethiopia and Uganda.

The analysis of the international law concepts (elements) in the CFA provided insights in to the most salient commitments at the international level. Accordingly, under Chapter 2, the analysis of the core substantive and procedural principles helped to postulate the corresponding national legal capacity required by examining specific national legal arrangements in place; the magnitude of their support; and the gaps in the links for implementation of international legal commitments in Ethiopia and Uganda.

6.3.1 Key finding: Substantive norms under the CFA

There is a strong relationship between international obligation to utilise a resource in an equitable and reasonable manner, and the national laws and institutions administering water allocation. The general principle of equitable and reasonable utilization discussed under the CFA offers riparian States the right to the utilization of water resources in their territories in an equitable and reasonable manner. The analysis of the principle on equitable and reasonable utilisation can provide insights into the national characteristics of these obligations and appropriate national framework for their implementation. The national laws and institutions

regulating water resources, quality, quantity, data and information and other activities can help in the determination of equitable and reasonable utilisation under the general principle of international and national law in keeping the status of water utilization under review, in light of substantial changes in the relevant factors and circumstances.⁶²⁴

6.3.2 Substantive obligations: Key findings from national case studies

i) Ethiopia

It was demonstrated in the findings of this research that the implementation of substantive principles required the necessary national legal framework, as seen in the examination of the Ethiopian national laws, which analysed the extent of support for the implementation of the principle of equitable and reasonable utilization and no-significant harm. The key findings of a general synthesis of the Ethiopian and Ugandan country case studies under Chapter 3 showed the existence of a body of laws, including the constitution, regulations, policy and institutional mandates supporting the implementation of international commitments of the CFA at the national level.

The Ethiopian constitution sets forth sustainable development as the outcome of the realisation of equitable entitlement: ‘all international agreements and relations concluded, established or conducted by the State shall protect and ensure Ethiopia’s right to sustainable development.’⁶²⁵ The recognition of the right to sustainable development under the Ethiopian constitution can be considered as an added value to the national understanding of the principle of equitable entitlement of the use of trans-boundary water resources.

The Ethiopian Water Resources Management Policy informs and directs international norms and conventions duly endorsed by Ethiopia as a basis for the recognition of the principle of

⁶²⁴ See Article 4 (5), *CFA*, supra note 49.

⁶²⁵ Constitution of the Federal Republic of Ethiopia, supra note 62, Art 43(3).

equitable entitlement of the use of trans-boundary waters.⁶²⁶ The policy statement provides for the need of supportive national measures in the form of implementing legislation for international watercourse treaties, which once ratified or acceded, will become an integral part of the national law.

Equitable and reasonable utilisation of international watercourses can be implemented through an integrated planning of water resources development, taking into account environmental, economic and social considerations. By providing principles on the use and allocation of water for the highest social and economic benefit, the Ethiopian Water Resources Management Proclamation can inherently enhance the national link with the principle of equitable and reasonable utilization under the CFA.⁶²⁷ Further legislative provisions under the proclamation, including those related to the issues of water as a scarce and vital socio-economic resource, sustainable objectives and efficient use, can play a supportive role in the implementation of the CFA principle of equitable utilization and forging the relationship between international principle and the national legal framework.⁶²⁸

ii) Uganda

Key policy and legislative considerations regarding the links between the principles of equitable and reasonable utilization and no-significant harm were identified in the analysis of the Ugandan case study. The most important key findings included the directive on trans-boundary water, which requires the promotion of equitable access, use and security for adequate water in order to satisfy the current and the future needs of the country.⁶²⁹ The incorporation of efficient use; equitable use; optimal use; sustainable use; and beneficial use within the national laws can promote the implementation of the principle of equitable and

⁶²⁶ *Ethiopian Water Resources Management Policy*, supra note 230 at 2.2.8 (3). (

⁶²⁷ *Ethiopian Water Resources Management Proclamation*, supra note 242, Article 3.

⁶²⁸ *Id.*, Article 6.

⁶²⁹ *Uganda National Water Policy*, supra note 230.

reasonable utilisation required under the CFA. Furthermore, the concepts of comprehensive and integrated plans; efficiency of use; equity of access; and sustainability of resources can be indicative of a degree of relevance to, and association with, the principle of equitable and reasonable utilisation under the CFA and the criteria for its implementation.

The degree of affinity to the principle of no significant harm gathered from national laws can also provide the basis on which the CFA requires on how transboundary water resources could be co-managed through international and national laws in order to avoid harm. Some of these measures, including conservation; protection of aquatic environment; flood mitigation; redistribution; transfer; and storage discussed under Chapter 3 can support the implementation of the no-significant harm rule under the CFA.

The research has amply demonstrated that the national legal frameworks in both case studies duly support the principles of good neighbourliness and the promotion of regional cooperation for optimal resource use. While the findings could be taken as a strength towards forging the relationship between the CFA substantive international law principles and supportive national laws necessary for their implementation, additional guidelines and procedures compatible with the implementation of factors for equitable and reasonable utilisation and the no-harm rules need to be put in place both at the regional and at the national levels in order to forge stronger harmonization.

6.4 Procedural obligations: Key findings from the CFA

The regular exchange on data and information is supported by the customary international law. However, effective implementation of the obligation is contingent on certain laws being in place at the national level; including laws relating to data collection, processing and dissemination. The findings of this research provide that the CFA implementation of the

principles of regular exchange of data and information and prior notification of planned measures can be facilitated putting in place national laws that can support its implementation.

6.4.1 Findings from the national case studies

i) Ethiopia

The Ethiopian case study establishes that the national legal framework, including the Ethiopian water policy and Water Sector Strategy with regard to trans-boundary water resources, required data gathering and assessment on water demand, while the Ethiopian water resources management proclamation and the Ethiopian water resources management regulation contained provisions on an inventory of water resources and national data mechanisms; as well as the meta-data for Information on Natural Resources and Environment. The legal framework can serve as a source of convergence with the requirements under the CFA and strength in the interface between international-national water law on data and information exchange and planned measures.

ii) Uganda

The findings from the Ugandan national case study experience show a long standing regional practice with regard to data and information exchange, a good experience in this case is the Owen Falls Dam Agreement between Uganda and Egypt. Other cooperative practices, such as the Lake Victoria Basin Commission (LVBC) can inform further supportive framework on international-national experience and capacity for the implementation of the demand under the CFA. The findings further indicated the recognition under the Ugandan law of data and information exchange as a key input to rational and optimal management, and use of the water resources, and which may serve in synergizing the international obligation under the CFA with national law. The systematic organization and management of data and information in the water sector in Uganda can also support the realization of the framework

and the harmonization of the national laws with CFA rules regarding regular exchange of readily available data and information.

In both case studies it was display that procedural obligations on data and information and prior notification on planned measures can offer the development of a framework to strengthen synergies with international commitments under the CFA. The principle of prior notification of planned measures under the CFA, which may have significant adverse environmental impacts, require the undertaking of a comprehensive assessment of those impacts at an early stage, and within national territories and the territories of other Basin States. Effective implementation of the CFA obligations is therefore contingent upon appropriate laws being put in place at the national level. Therefore, the national case analysis on 'regular' exchange of data and information as an on-going and systematic process demands the observation of minimum requirements by the countries and in accordance to their existing laws with a view to implementing factors and circumstances for equitable and reasonable utilization.

6.4.2 Key findings on Environmental Impact Assessment (EIA)

In order to support the implementation of trans-boundary EIAs at the national level, a number of key aspects were analysed including factors that must be visible within the national laws, such as criteria and procedures for determining whether an activity is likely to have significant adverse environmental impacts within a national territory. The analysis indicated the development of criteria can help to enhance the relationship between international and national framework to conduct EIA audits and facilitate consultations with States that may be affected by the planned measures. The implementation of trans-boundary EIA under the CFA is, therefore, a national activity that must be realized through national laws and

institutions. The national environmental policies and other laws analysed offer facilities for its implementation and the organs responsible for implementation and enforcement.

The thesis findings demonstrated the need to strengthen the relationship between trans-boundary EIA and national laws by analysing the requirement by the Nile Basin States to undertake a comprehensive assessment of EIA within national territories at an early stage for planned measures that may have significant adverse environmental impacts. The CFA's requirement to take into account the national legislations with regard to implementation of audit of EIA on planned measures can set a basis for supportive laws to be put in place for the realization of international commitments.

A number of applicable national laws and principles on the EIA and audits in Ethiopia and Uganda can, therefore, help in advancing the framework for promoting the national and regional implementation of trans-boundary EIAs as required in the CFA.

i) Ethiopia

The analysis of the Ethiopian Conservation Strategy and the Ethiopian EIA Proclamation under Chapter 4 provided the basic requirements for commencement of projects were found to be useful inputs in establishing links with the provisions of the CFA trans-boundary EIA. However, the lack of detailed procedures connecting the national framework with trans-boundary EIA needs further work on developing national procedures. The development of detailed trans-boundary rules under the Nile River Basin Commission must also be envisaged with a view to harmonizing them with the national laws (and vice versa), in order to create the proper links between the two for the implementation of CFA commitments, in particular, with regard to the requirements on EIA on planned measures.

ii) Uganda

The Ugandan national case study provided supporting laws, including the National Environment Act and Assessment Regulations for undertaking the EIA. Procedures for determining compliance status with environmental regulatory requirements, environmental management system and overall environmental risk under the National Environment (Audit) Regulation can help in strengthening in the implementation of trans-boundary EIA under the CFA and national laws. However, more important work needs to be done in conjunction with the realization of the NRBC's procedural development on transboundary EIA. As stated in the CFA the Basin-wide procedures, which must take in to account national laws of the basin countries calls for harmonious understanding between national laws and basin wide procedures. This could also widen the opportunity for the support of national laws and narrow down the gaps between the requirements demanded under the CFA and the national laws.

6.5 Findings on public participation

6.5.1 Findings from the CFA

This research illustrated that norms of public participation are rapidly crystalizing within water resources management primarily having a firm root at local level, which in turn has served as a basis for a similar development at international level.

A finding of this research indicated that, although public participation cannot be categorized as an obligation under international water law, it, however, provides an important means by which international commitments are implemented at the national level. The analysis identified explicit and implicit demands in the CFA, where public participation is required at the planning levels of transboundary projects. As transboundary EIA necessitates public participation as seen in many examples in the case studies, it would, therefore, be erroneous

to omit the subject for the mere reason of not belonging to corpus of international water law principles. At the national level national legislations, policies, and institutions relating to access to information and access to justice can support the implementation of international commitments. It is observed that public participation is strongly reliant on the existence of an enabling environment at the national level that can facilitate the implementation of a number of provisions of the CFA.

As stated above, this research has established that international water law did not sufficiently address the issue of public participation, as a result of which, the lack of clear provision under the 1997 watercourses convention has generated debates on whether public participation is a principle of international water law.⁶³⁰ However, the principle of public participation is incorporated into the CFA as a general principle providing for ‘all those within a State who will or may be affected by the project in that State to participate in an appropriate way in the planning and implementation process.’⁶³¹ The CFA also requires the Nile Basin States to ‘make every effort to ensure that the project and any related agreement is consistent with the basin-wide framework.’⁶³²

The CFA provision and the existing experience by the Nile Basin Discourse (NBD) can help to connect a cross-section domestic legal framework on public participation with the requirements under the CFA.

6.5.2 Findings: National case studies

Public participation in the planning and development of trans-boundary water resources is guaranteed as a basic right of citizens in the constitutions in both the Ethiopian and Ugandan case studies. National laws on the issue can ensure access to information to individuals and

⁶³⁰ See Woodhouse, M., ‘*Is Public Participation a Rule of the Law of International Watercourses?*’ 43 Nat. Resources J., (2003) at 137.

⁶³¹ CFA, *supra* note 45, Article 10 (a).

⁶³² *Id.*, Article 10 (b).

communities; provide the right to participate in the decision making processes; and provide access to judicial or administrative justice as well as claim redress or remedy. The case study on public participation can, therefore, provide a means by which a framework may be developed in order to strengthen the international implementation of the CFA at national level.

i) Ethiopia

The case study has shown that access to justice and the right to full consultation in the planning and implementation of environmental policies and projects directly affecting the people is a constitutional right that can be invoked in a court of law, or any other competent body with judicial power. Community participation under the Ethiopian Environment Policy and the Federal Environmental Impact Assessment Proclamation promote the involvement of stakeholders in the process of projects. The Ethiopian Water Resources Management Policy can also serve as an important input that can be employed in trans-boundary project public participation and EIA as required under the CFA. Public participation from a project conception to planning, implementation to monitoring, and evaluation can provide a linkage with implementation of public participation requirements under the CFA.

Despite existing general laws and policy principles identified in the case study, there are no specific by-laws and proper institutional mandates to provide effective national support for the implementation of public participation in relation to those issues in the CFA, such as planned measures and EIA requiring such involvement. The effective implementation of the existing laws is undermined by the intervention of other legislation restricting the right to public participation; the existence of which may impact the interface between international and national laws. It is, therefore, important that existing laws on public participation are strengthened with specific other legislations in support of carrying out international transboundary commitments. In addition, laws or legislations hindering effective

implementation need to be amended as a matter of priority in order to ultimately forge a mutually supportive relationship between international law and national laws.

ii) Uganda

Access to information in the possession of State organs is a constitutional guarantee, which enables to enforce using public interest litigation. The case study has exhibited how public participation is realized in transboundary context through the system of public comments and public hearings. The national laws in Uganda can, therefore, play an important role in supporting the implementation of public participation in the implementation of CFA principles requiring public participation.

However, despite its supportive role the effective implementation with regard to public participation within the national legal system can only be fully guaranteed through a reform of the national legal system. In particular, the statutory discretion by the State in determining the type of publicly accessible information require reconsiderations in order to avoid the abuse of power, as discussed in the case concerning the Bujagali hydropower project.

6.6Key Findings: Dispute Settlement

The key findings with regard to disputes have shown that effective laws, policies, and institutions at a national level can support disputes between two or more Nile Basin States concerning the interpretation or application of the CFA. As observed in this research, the universal principles of peaceful settlement disclosed in the CFA are being adopted under both the Ethiopian and Ugandan constitutions. This can support the means of transboundary water disputes stated under the CFA. The CFA dispute settlement mechanisms, negotiations; good offices; mediation; conciliation; or third party arbitration can all be considered within the meaning of the principle of peaceful settlement of disputes. The CFA opens other avenues on

which parties may also submit their disputes to the International Court of Justice (ICJ) or establishing a Fact Finding Commission.⁶³³

i) Ethiopia

The Ethiopian case study demonstrate the existence of different kinds of water disputes; trans-boundary, inter states, domestic water supply (users or uses), agriculture, grazing and environment. The law appropriately mandates the Ministry of Water and Energy to examine and make decisions on water related disputes. However, the scope of the mandate is restricted to disputes among permit holders, or between a permit holder and a third party. Inter-state (Federal system) disputes are left to the mandate of the House of the Federation. However, a closer look in the interpretation of the mandates of the Ministry of Water and Energy to administer the country's water resources can be considered as inclusive or comprehensive mandate to intervene in trans-boundary water disputes. This positive interpretation must be pursued in order to support the CFA dispute settlement mechanisms in relation to transboundary water issues.

Finally, there are areas of linkages that can be considered in order to coordinate general procedures on dispute settlement as provided under international law within the CFA and the existing domestic laws in Ethiopia. However, the constitutional and policy provisions allowing the peaceful settlement of disputes need to be adequately supported by clear and specific procedural legislations, which can address transboundary water disputes. In this regard, national laws and regulation need to be harmonised with the CFA rules thorough the amendment of the existing laws and institutions in order to help solve national and trans-boundary water disputes in a complementary manner.

⁶³³ CFA, supra note 45, Annex, Fact Finding Commission, Para. 5.

ii) Uganda

In the Ugandan case study, the recognition of traditional and customary practice in the settlement of water disputes, in particular, the role of village elders and the local chiefdoms in mediating water disputes under the National Water Policy can serve as supportive and useful local tool in tackling issues affecting community based disputes.⁶³⁴ Other Ugandan experiences offering options, such as the Local Council Courts, the District Water Committees, the Magistrate Courts or the Ministry of Water - the latter as acting as a final administrative arbiter could also strengthen the role of the national legal system in supporting the implementation of the CFA dispute settlement mechanisms.⁶³⁵

The case study of existing national legislations and policy principles, in particular, specific legislation, such as the 1998 Ugandan Land Act can allow setting practice for transboundary dispute settlement. The devolution of power on dispute settlement at the lowest local level is reflected in the operation of the tribunal with the mandates at sub-county and district levels.⁶³⁶

Lessons can also be learned from the failures with regard to local tribunals due to financial constraints and lack of capacity in dealing with the issue of transboundary water disputes.⁶³⁷ As far as the relationship of national legislations with international settlement of disputes is concerned, the settlement of international disputes by peaceful means has been incorporated as a principle of the Uganda's constitution. The principle can serve as a basis to advance a framework for the relationship between the principles of international dispute settlement required under the CFA and Ugandan national laws.

⁶³⁴ Uganda National Water Policy, *supra* note 253.

⁶³⁵ *Id.*

⁶³⁶ *The Land Act*, 1998, Date of commencement: 2nd July 1998.

⁶³⁷ *Id.*

National disputes amicably addressed within the national appropriate legal and institutional frameworks can strengthen the implementation of the CFA dispute settlement of trans-boundary water. Therefore, national laws on water dispute resolution discussed in the case studies in this thesis, and the mandates for the management of water disputes within the national border, can impact the interface between international and national laws.

6.7 Institutional Synthesis

The finding of this research has amply demonstrated that regional and national organizational structures provide important mechanisms by which rules; procedures; and processes can be implemented. The analysis of institutional structures in this research exhibited that international river basin organizations serving as mechanisms for cooperation and management of shared water resources⁶³⁸ require co-ordination for fostering synergies both within and across borders in order to strengthen the interface between the role of international or regional structures and national institutions. The CFA as a framework demonstrated the requirement of multilevel structures, with distinctive roles and multiple mandates at basin, sub-basin and national levels, for policy decisions and governance in the determination of equitable utilization in each riparian country; the settlement of disputes; the interpretation and application of other provisions of the framework agreement.

6.7.1 The national interface: Examples from Ethiopia

The institutional aspect of trans-boundary water management is intrinsically linked with the institutional structures and mandates at a national level. Such mandates involve the key role of the Ministry of Water and Energy in undertaking basin studies; and the determination of conditions and methods required for optimum and equitable allocation and utilization of

⁶³⁸ CFA, *supra* note 45, See Preamble.

water bodies that flow across or lie between regional administrations.⁶³⁹ The mandates confer dual responsibility on the MoWE; the implementation of national laws and the power to negotiate and implement trans-boundary water treaties. As a focal point institution, this dual responsibility can help it play a pivotal role in strengthening of international-national linkages.⁶⁴⁰

A de-centralized national institutional approach and devolution of power to national river basins organizations under Ethiopian law can allow smooth access to information exchange required under the CFA and can also create a nexus between international and national and river basin management.⁶⁴¹ The Regional Water Bureaus as structures can use their delegated mandates from the MoWE in influencing the planning, management, utilization and protection of transboundary water resources within their respective territories; thereby strengthening the national linkages with the NRBO.

The gaps identified in this research impacting the support of Ethiopian national institutions in the implementation of the regional NRBC mandates include, frequent sector restructuring, a phenomenon resulting in a threat to institutional sustainability and diminished institutional memory. The impact may be the cause for a delay in the progress of trans-boundary water resources issues and can impede the necessary link between international and national activities.

The other gap, which requires clarity, is the overlapping of mandates between the Federal Government and the Regional States with regard to water resources management and administration. Other issues, which might require due consideration include lack of a direct organizational chain between the MoWE and the regional bureaux, lack of proper mechanisms for data and information exchange, and lack of capacity can all impact the implementation of CFA's international commitments at the national level.

⁶³⁹ Id., Article 26, (1), (c).

⁶⁴⁰ Id., Articles, 17 (5) and (8).

⁶⁴¹ Id., Articles 4 and 6.

The discussion of the Ethiopian case study has shown that the Ministry of Water and Energy plays a key focal role in advancing administration of trans-boundary water resources. Other responsible bodies, including river basin organizations and regional water bureaux hold mandates corresponding to their decentralized institutional structures at different administrative levels. The distribution of mandates across various institutions can serve as key input to effect coordination and maintain the relationship between basin wide mandates under the CFA and the national structures. Thus, the national institutions, ranging from the Federal administration to the local can be utilized in the collection of data, supervising equitable utilization and issuing permits and creating link between international river basin management and national institutions.

6.7.2 Examples from Uganda

According to the findings of the case study water structures in Ugandan are organized with the objective of addressing the issues of co-ordination, allocation, delegation of responsibilities between ministries and public authorities for the investigation, use, control, protection and management of water resources. The key institutional mandate rests with the Ministry of Water and Energy, which is also responsible for the implementation of international commitments with regard to trans-boundary water resources. Decentralisation and streamlining of existing laws on local government can ensure local governance and democratic participation and control in the decision-making process. The local structures supporting these arrangements, i.e. the District Councils and municipalities or town councils, can play a key role in facilitating integrated water resources management in partnership with other authorities.

As assessed under the national case study, the mechanism for sector linkages coordinates activities through Water Policy Committees, which are comprised of various bodies, including the Ministry of Foreign Affairs, which is responsible for the foreign policy as the

relevant institution for the implementation international watercourse agreements at national level. The Committee's wider mandates in the preparation, implementation, amendment, or recommendation of a water action plan and its mandate to provide policy advice and review of water law can be used in in facilitating effective implementation of the regional mandates of the NRBO and CFA commitments.

Despite the above positive aspects, the decentralization of institutional structures and effective coordination failed to function properly, due to the fact that the system is seldom put into practice. Furthermore, the scope of the exercise of the mandates is restricted to water supply and sanitation issues rather than covering comprehensive water resources management. It is, therefore, important to note that, while the exiting institutional structures may offer opportunities towards the implementation of international commitments under the CFA. The above gaps have to be filled with the introduction of new modalities supporting capacities of different institutions within ministries and local entities to discharge their respective responsibilities in the implementation of the CFA's structural mandates.

6.8 The application of the framework to other states

The key message of this thesis is to show to what extent, national laws and institutions examined under the two case studies in supported or hindered the implementation of and compliance with international obligations under the CFA. The study can draw attention on the need for a combined study of international legal commitments and national laws and institutions in the management of trans-boundary water resources. Many international watercourse treaties concluded between states lack effective implementation, because they tried to function in isolation from the national laws and institutions. The outcome of the case studies has shown national laws and institutions can play supportive role in the implementation of substantive and procedural rules of international watercourse

treaties. It further demonstrated that international agreements are highly contingent on the existence of appropriate national legal framework and institutions facilitating national implementation of international commitments. The studies also identified gaps within national laws and institutions that must be filled through harmonisation. The implications of the examination of national laws and institutions supporting or hindering the implementation of legal commitments under the CFA h can provide an all-encompassing experience for other transboundary river basin management and cooperation. However, the application of the this study to other states cannot be standardized as each river basin maintains its peculiar characteristics - a fact that future research should take into account.

6.9 Conclusion

This chapter has addressed the main theme of the thesis, a framework for strengthening the international and national water law interface based on a combined study of water law (international and national). The finding in this chapter has also offered a better understanding of national laws and institutions supporting the implementation of international commitments with some gaps, which can be addressed in strengthening the relationship between the two.

Specifically, the thesis has also considered the national laws and institutions in place in Ethiopia and Uganda inorder to ascertain the extent of support of the implementation of the CFA. This chapter has summarized the findings of the analysis of the thesis relating to a framework for reviewing the national capacity of the two case studies in the implementation of international commitments. A review of the findings of the study of national laws and institutions ascertained the strengths, as well the constraints, in the application of a combined framework for implementation, thereby advancing the nexus and minimising the weaknesses. A review of the findings on theoretical analysis accentuated the basic changes in previous

perceptions of the study of international and national laws as separate branches of laws; and affirmed the contemporary understanding of their complementarity.

One of the key findings of this research was the generic nature of the combined framework, where it is not intended to for application within the exclusive domain of the Nile; but can also be useful to other river basins, or to other fields of international-national law.

CHAPTER 7

SUMMARY AND CONCLUSION

The main purpose of this research is to examine the interface between international and national laws based on the proposed case studies for the implementation of the Nile River Basin Cooperative Framework Agreement (CFA) in Ethiopia and Uganda, and in order to draw lessons for other basins. A general literature review of existing international theories on the relationships between international law and national law conducted under this research helped to bring in new insights on how to build on the existing literature.

Analysis of the national laws and institutions for water resources management in Ethiopia and Uganda has been conducted within the content and spirit of the implementation of international water law principles as incorporated under the CFA. It has been demonstrated that a combined framework can be employed by examining national policies, laws, regulations and institutions impacting the implementation of substantive and procedural principles of international water law within the ambit of CFA.

The most relevant core substantive and procedural rules under the CFA were selected in determining the analysis on the interface between the CFA rules of international law and national water laws in Ethiopia and Uganda case studies. The research has conceptualized mutually supportive linkages between the selected core elements in the CFA and existing Ethiopian and Ugandan national legal and institutional structures can be established for the realization of their implementation.

Procedural rules which have been discussed in the thesis provided valuable insights regarding the realization of the extent of support of the principles of planned measures and Environmental Impact Assessment (EIA) and audits in order to ascertain the strength of

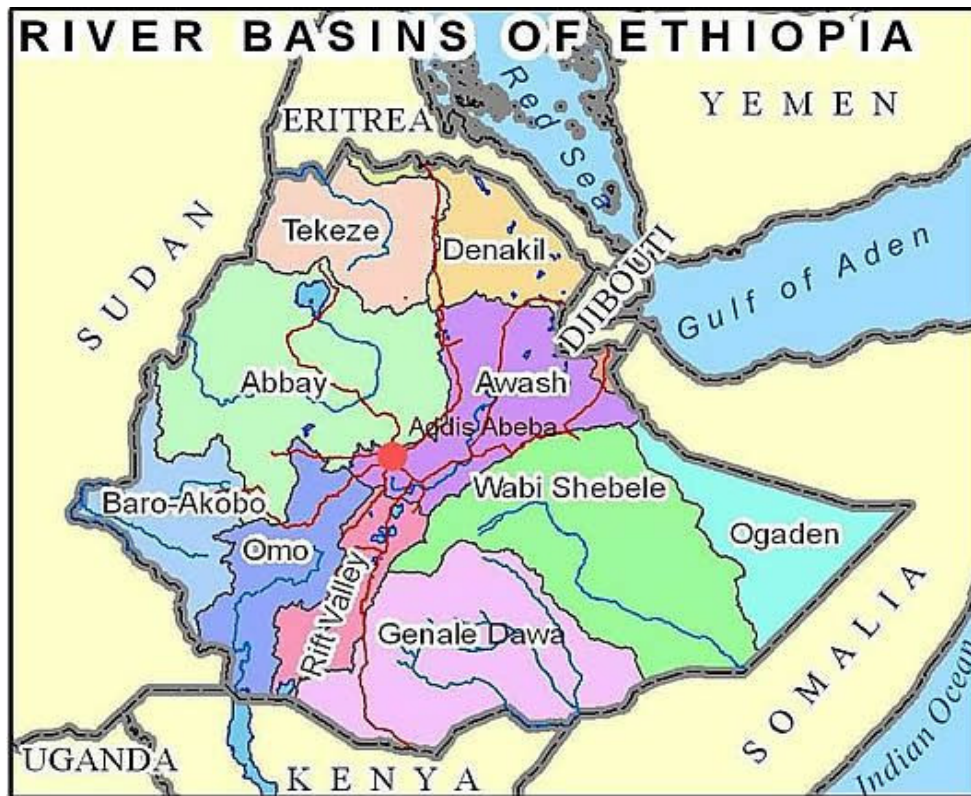
interface between international and national laws. The analytical framework on institutional framework examined under chapter 5 provided an overview of basin-wide, sub-basin and national institutional structures, and identified the areas of supportive linkages with the national institutions.

The main output of this research is assessing the method for examining the linkages between international and national laws and institutions, as discussed under chapter 6.

Finally, the analysis has posited that a combined study of water law (international and national) can offer a better understanding of how national laws and institutions can support or hinder the implementation of international commitments under the CFA. Furthermore, based on the examination of the case study and the potential implementation of the CFA within Ethiopia and Uganda, the thesis has attempted to bring out the needs for the national laws and institutions which must be in place in order to support the implementation of the CFA. As part of the new theoretical approach, which considers the relationship between international law and national law, the thesis has tried to address the issue of interface between international and national laws as integrative rather than exclusive of each other.

ANNEXES

ANNEX I- MAPS





ANNEX II- Agreement on the Nile River Basin Cooperative Framework

Agreement on the

Nile River Basin Cooperative Framework

Preamble

The States of the Nile River Basin,

Affirming the importance of the Nile River to the economic and social well-being of the peoples of the States of the Nile River Basin;

Motivated by the desire to strengthen their cooperation in relation to the Nile River, a great and vital natural resource which binds them together, and in relation to the sustainable development of the Nile River Basin;

Recognizing that the Nile River, its natural resources and environment are assets of immense value to all the riparian countries;

Convinced that a framework agreement governing their relations with regard to the Nile River Basin will promote integrated management, sustainable development, and harmonious utilization of the water resources of the Basin, as well as their conservation and protection for the benefit of present and future generations;

Convinced also that it is in their mutual interest to establish an organization to assist them in the management and sustainable development of the Nile River Basin for the benefit of all;

Mindful of the global initiatives for promoting cooperation on integrated management and sustainable development of water resources;

Have agreed as follows:

Article 1

Scope of the Present Framework

The present Framework applies to the use, development, protection, conservation and management of the Nile River Basin and its resources and establishes an institutional mechanism for cooperation among the Nile Basin States.

Article 2

Use of Terms

For the purposes of the present Cooperative Framework Agreement:

(a) "Nile River Basin" means the geographical area determined by the watershed limits of the Nile River system of waters; this term is used where there is reference to environmental protection, conservation or development;

(b) “Nile River system” means the Nile River and the surface waters and groundwaters which are related to the Nile River; this term is used where there is reference to utilization of water;

(c) “Framework” means the present Cooperative Framework Agreement;

(d) “State of the Nile River Basin”, “Nile Basin State” or “Basin state” means a State party to the present Framework in whose territory part of the Nile River Basin is situated;

(e) “The Commission” means the Nile River Basin Commission established under Part III of the present Framework;

(f) “Water security” means the right of all Nile Basin States to reliable access to and use of the Nile River system for health, agriculture, livelihoods, production and environment.

PART I. GENERAL PRINCIPLES

Article 3

General Principles

The Nile River Basin and the Nile River System shall be protected, used, conserved and developed in accordance with the following general principles;

1. Cooperation

The principle of cooperation between States of the Nile River Basin on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilization and adequate protection and conservation of the Nile River Basin and to promote joint efforts to achieve social and economic development.

2. Sustainable development

The principle of sustainable development of the Nile River Basin.

3. Subsidiarity

The principle of subsidiarity, whereby development and protection of the Nile River Basin water resources is planned and implemented at the lowest appropriate level.

4. Equitable and reasonable utilization

The principle of equitable and reasonable utilization of the waters of the Nile River System.

5. Prevention of the causing of significant harm

The principle of preventing the causing of significant harm to other States of the Nile River Basin.

6. The right of Nile Basin States to use water within their territories

The principle that each Nile Basin State has the right to use, within its territory, the waters of the Nile River System in a manner that is consistent with the other basic principles referred to herein.

7. Protection and conservation

The principle that Nile Basin States take all appropriate measures, individually and, where appropriate, jointly, for the protection and conservation of the Nile River Basin and its ecosystems.

8. Information concerning planned measures

The principle that the Nile Basin States exchange information on planned measures through the Nile River Basin Commission.

9. Community of interest

The principle of the community of interest of the Nile Basin States in the Nile River System.

10. Exchange of data and information

The principle of the regular and reciprocal exchange among States of the Nile River Basin of readily available and relevant data and information on existing measures and on the condition of water resources of the Basin, where possible in a form that facilitates its utilization by the States to which it is communicated.

11. Environmental impact assessment and audits

The principle of environmental impact assessment and audits.

12. Peaceful resolution of disputes

The principle of the peaceful resolution of disputes.

13. Water as a finite and vulnerable resource

The principle that fresh water is a finite and vulnerable resource, essential to sustain life, development and the environment, and must be managed in an integrated and holistic manner, linking social and economic development with protection and conservation of natural ecosystems.

14. Water has social and economic value

The principle that water is a natural resource having social and economic value, whose utilization should give priority to its most economic use, taking into account the satisfaction of basic human needs and the safeguarding of ecosystems.

15. Water security

The principle of water security for all Nile Basin States.

PART II. RIGHTS AND OBLIGATIONS

Article 4

Equitable and reasonable utilization

1. Nile Basin States shall in their respective territories utilize the water resources of the Nile River System in an equitable and reasonable manner. In particular, those water resources shall be used and developed by Nile Basin States with a view to attaining optimal and sustainable utilization thereof and benefits therefrom, taking into account the interests of the Basin States concerned, consistent with adequate protection of those water resources. Each Basin State is entitled to an equitable and reasonable share in the beneficial uses of the water resources of the Nile River System.

2. In ensuring that their utilization of Nile River System water resources is equitable and reasonable, Nile Basin States shall take into account all relevant factors and circumstances, including but not limited to the following:

- (a) Geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;
- (b) The social and economic needs of the Basin States concerned;
- (c) The population dependent on the water resources in each Basin State;
- (d) The effects of the use or uses of the water resources in one Basin State on other Basin States;
- (e) Existing and potential uses of the water resources;
- (f) Conservation, protection, development and economy of use of the water resources and the costs of measures taken to that effect;
- (g) The availability of alternatives, of comparable value, to a particular planned or existing use;
- (h) The contribution of each Basin State to the waters of the Nile River system;
- (i) The extent and proportion of the drainage area in the territory of each Basin State.

3. In the application of paragraphs 1 and 2 above, the Nile Basin States concerned shall, when the need arises, enter into consultations in a spirit of cooperation.

4. The weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors. In determining what is a reasonable and equitable use, all relevant factors are to be considered together and a conclusion reached on the basis of the whole.

5. Nile Basin States shall, in their respective territories, according to their national laws and regulations, keep the status of their water utilization under review in light of substantial changes in relevant factors and circumstances.

6. Nile Basin States shall observe the rules and procedures established by the Nile River Basin Commission for the effective implementation of equitable and reasonable utilization.

Article 5

Obligation not to cause significant harm

1. Nile Basin States shall, in utilizing Nile River System water resources in their territories, take all appropriate measures to prevent the causing of significant harm to other Basin States.
2. Where significant harm nevertheless is caused to another Nile Basin State, the State, whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures, having due regard to the provisions of Article 4 above, in consultation with the affected State, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.

Article 6

Protection and conservation of the Nile River Basin and its ecosystems

1. Nile Basin States shall take all appropriate measures, individually and, where appropriate, jointly, to protect, conserve and, where necessary, rehabilitate the Nile River Basin and its ecosystems, in particular, by:
 - (a) protecting and improving water quality within the Nile River Basin;
 - (b) preventing the introduction of species, alien or new, into the Nile River system which may have effects detrimental to the ecosystems of the Nile River Basin;
 - (c) protecting and conserving biological diversity within the Nile River Basin;
 - (d) protecting and conserving wetlands within the Nile River Basin; and
 - (e) restoring and rehabilitating the degraded natural resource base.
2. Nile Basin States shall, through the Nile River Basin Commission, take steps to harmonize their policies in relation to the provisions of this article.

Article 7

Regular exchange of data and information

1. In pursuance of their cooperation concerning the use, development and protection of the Nile River Basin and its water resources, Nile Basin States shall on a regular basis exchange readily available and relevant data and information on existing measures and on the condition of water resources of the Basin, where possible in a form that facilitates its utilization by the States to which it is communicated.
2. If a Nile Basin State is requested by another Basin State to provide data or information that is not readily available, it shall employ its best efforts to comply with the request but may condition its compliance upon payment by the requesting State of the reasonable costs of collecting and, where appropriate, processing such data or information.

3. In the implementation of their obligations under Paragraph 1 and 2, Nile Basin States agree to observe procedures to be developed by the Nile River Basin Commission.

Article 8

Planned measures

1. Nile Basin States agree to exchange information through the Nile River Basin Commission.
2. Nile Basin States shall observe the rules and procedures established by the Nile River Basin Commission for exchanging information concerning planned measures.

Article 9

Environmental impact assessment and audits

1. For planned measures that may have significant adverse environmental impacts, Nile Basin States shall, at an early stage, undertake a comprehensive assessment of those impacts with regard to their own territories and the territories of other Nile Basin States.
2. The criteria and procedures for determining whether an activity is likely to have significant adverse environmental impacts shall be developed by the Nile River Basin Commission.
3. Where circumstances so warrant, according to criteria to be developed by the Nile River Basin Commission, a Nile Basin State that has implemented measures of the kind referred to in paragraph 1 shall conduct an audit of the environmental impacts of those measures. That State shall enter into consultations relating to the audit with Nile Basin States affected by the measures on their request.
4. The Commission, taking into account national legislation of the Nile Basin States, shall adopt criteria for carrying out audits of measures existing at the date of the entry into force of this Framework.
5. Nile Basin States shall carry out audits of measures existing at the date of the entry into force of this Framework in accordance with national legislation and under criteria adopted under this Framework.

Article 10

Subsidiarity in the development and protection of the Nile River Basin

In planning and implementing a project pursuant to the principle of subsidiarity set forth in Article 3(3), Nile Basin States shall:

- (a) allow all those within a State who will or may be affected by the project in that State to participate in an appropriate way in the planning and implementation process;
- (b) make every effort to ensure that the project and any related agreement is consistent with the basin-wide framework.

Article 11

Prevention and mitigation of harmful conditions

Nile Basin States shall, individually and, where appropriate, jointly through cost-sharing by the Nile Basin State or States that may be affected, make every effort to take all appropriate measures to prevent or mitigate conditions related to the Nile River System that may be harmful to other Nile Basin States, whether resulting from human conduct or natural causes, such as flood conditions, invasive water weeds, water-borne diseases, siltation, erosion, drought or desertification. In implementing this provision, Nile Basin States shall take into account guidelines to be developed by the Nile River Basin Commission.

Article 12

Emergency Situations

1. For the purposes of this provision, “emergency” means a situation that causes, or poses an imminent threat of causing, serious harm to Nile Basin States or other States and that results suddenly from natural causes, such as floods, landslides or earthquakes, or from human conduct, such as industrial accidents.
2. A Nile Basin State shall, without delay and by the most expeditious means available, notify other potentially affected States and competent international organizations of any emergency originating in its territory.
3. A Nile Basin State within whose territory an emergency originates shall, in cooperation with potentially affected States and, where appropriate, competent international organizations, immediately take all practicable measures necessitated by the circumstances to prevent, mitigate and eliminate harmful effects of the emergency.
4. When necessary, Nile Basin States shall jointly develop contingency plans for responding to emergencies, in cooperation, where appropriate, with other potentially affected States and competent international organizations.

Article 13

Protection of the Nile River Basin and related installations in time of armed conflict

The Nile River System and related installations, facilities and other works, as well as installations containing dangerous forces in the Nile River Basin, shall enjoy the protection accorded by the principles and rules of international law applicable in international and non-international armed conflict, in particular rules of international humanitarian law, and shall not be used in violation of those principles and rules.

Article 14

Water Security

Having due regard to the provisions of Articles 4 and 5, Nile Basin States recognize the vital importance of water security to each of them. The States also recognize that the cooperation

management and development of waters of the Nile RiverSystem will facilitate achievement of water security and other benefits. Nile BasinStates therefore agree, in a spirit of cooperation:

(a) to work together to ensure that all states achieve and sustain water security;

(b)* the unresolved Article 14(b) is annexed to be resolved by the Nile RiverBasin Commission within six months of its establishment.

* Article 14(b) has been transferred to the Annex as per decision of the Extra-Ordinary Nile-COM Meeting held in May 2009 in Kinshasa,DR Congo.

PART III. INSTITUTIONAL STRUCTURE

SECTION A. THE NILE RIVER BASIN COMMISSION

Article 15

Establishment

The Nile River Basin Commission is hereby established by the Nile RiverBasin States.

Article 16

Purpose and Objective

The purpose and objective of the Commission is:

(a) To promote and facilitate the implementation of the principles, rights and obligations provided for in the present Framework;

(b) To serve as an institutional framework for cooperation among Nile BasinStates in the use, development, protection, conservation and management ofthe Nile River Basin and its waters;

(c) To facilitate closer cooperation among the States and peoples of the NileRiver Basin in the social, economic and cultural fields.

Article 17

Organs

The Commission is comprised of:

(a) Conference of Heads of State and Government

(b) Council of Ministers

(c) Technical Advisory Committee

(d) Sectoral Advisory Committees

(e) Secretariat

Article 18

Headquarters

The headquarters of the Commission shall be situated at Entebbe, Uganda.

Article 19

Legal Status

1. The Commission is established as an intergovernmental organization and shall enjoy international legal personality, with such legal capacity as may be necessary for the performance of its functions, in particular, the capacity to enter into agreements, to incur obligations, to receive donations, and to sue and be sued in its own name.

2. The Commission and its officials shall, in the territory of each Nile Basin State, enjoy such privileges and immunities as are necessary for the performance of their functions under this Framework.

3. The privileges and immunities referred to under this article shall be provided for in detail in a Protocol to this Framework.

SECTION B. THE CONFERENCE OF HEADS OF STATE AND GOVERNMENT

Article 20

Structure and Procedures

1. The Conference of Heads of State and Government (“the Conference”) is composed of Heads of State and Government of Nile Basin States.

2. The Conference shall establish its own rules and procedures.

Article 21

Functions

The Conference shall be the supreme policy-making organ of the Commission.

SECTION C. THE COUNCIL OF MINISTERS

Article 22

Structure

The Council of Ministers (the “Council”) shall be composed of the Minister for Water Affairs of each Nile Basin State and other ministers according to the agenda of the Commission.

Article 23

Procedures

1. Except as otherwise provided, the Council shall establish its own rules and procedures.
2. The Council shall convene once a year in regular session and in special session at the request of any Nile Basin State.
3. Unless the Council decides otherwise, the venue of regular sessions shall rotate among the Nile Basin States in alphabetical order, in English. The venue of a special session shall be the same as that of the preceding regular session.
4. Regular sessions shall be chaired by the Nile Basin State in which they are held. Special sessions shall be chaired by the State that chaired the next preceding regular session.
5. Decisions of the Council shall be taken by consensus.
6. Decisions of the Council are binding on all Nile Basin States.

Article 24

Functions

1. The Council is the governing body of the Commission. It may refer matters to the Conference of Heads of State for decision.
2. The Council serves as a forum for discussion of matters within the scope of its functions and the Framework.
3. The Council oversees the effective implementation of the Framework.
4. The Council may establish, and assign responsibilities to any ad hoc committees it considers to be necessary for the proper fulfilment of its functions.
5. The Council adopts, keeps under review and revises as necessary, plans for the coordinated, integrated, and sustainable management and development of the Nile River Basin.
6. The Council approves the annual work programs of the Commission.
7. The Council ensures the financial sustainability of the Commission.
8. The Council approves rules and procedures governing the operations of the Technical Advisory Committee, Sectoral Advisory Committees, and the Secretariat, as well as its work program and financial and staff regulations.
9. The Council appoints the Executive Secretary and other senior staff of the Commission.
10. The Council makes determinations concerning the staffing and organizational structure of the Secretariat.
11. The Council adopts, keeps under review and revises as necessary, rules, procedures, guidelines and criteria for the implementation of the provisions of this Framework.

12. The Council examines and makes decisions regarding the determination of equitable and reasonable use of water in each riparian country taking into consideration the factors provided in Article 4, paragraph 2.

13. At the request of the States concerned the Council addresses questions and differences that may arise between Nile Basin States concerning the interpretation or application of the Framework. It may make recommendations to the States concerned with regard to such questions and differences.

14. The Council promotes the full and effective application of the Framework.

15. The Council decides upon a sliding scale of contributions of Nile Basin States for the financing of the budget of the Commission, and approves the budget of the Commission.

16. Where appropriate, the Council decides upon formulas for cost and benefit sharing by Nile Basin States in respect of particular joint projects within the Nile River Basin.

17. The Council performs such other functions in the effectuation of the purposes of the Commission as it may decide.

SECTION D. THE TECHNICAL ADVISORY COMMITTEE

Article 25

Structure and Procedures

1. The Technical Advisory Committee (the “TAC”) shall be composed of two members from each Nile Basin State who shall be senior officials. Delegates may bring other experts to meetings of the TAC as necessary to deal with special questions.

2. The TAC may establish specialized Working Groups to deal with matters within its competence.

3. The TAC shall convene twice a year in regular session and in special session if and as the Council, through its Chair, so requests. Unless otherwise decided, the venue for sessions shall be the headquarters of the Commission.

4. The TAC shall propose, for the approval of the Council, its own rules and procedures.

Article 26

Functions

1. The TAC shall prepare for the consideration of the Council cooperative programs for the integrated and sustainable management and development of the Nile River Basin.

2. On the basis of reports from the Secretariat, the TAC shall make recommendations to the Council concerning annual work programs and budget of the Commission.

3. The TAC shall propose to the Council rules, procedures, guidelines and criteria provided for in this Framework.

4. The TAC shall make recommendations to the Council on the implementation of the provisions of this Framework.
5. The TAC shall make recommendations to the Council on decisions regarding the determination of equitable and reasonable use of water in each riparian country taking into consideration the factors provided in Article 4, paragraph 2.
6. The TAC shall advise the Council on technical matters relating to the use, development, protection, conservation and management of the Nile River Basin and the Nile River System, including protection from drought and floods.
7. The TAC shall make proposals to the Council concerning appointment of the Executive Secretary and senior technical staff of the Secretariat, and supervises the Secretariat.
8. The TAC shall make recommendations to the Council concerning rules and procedures governing the operations of the Secretariat, as well as its work program.
9. When directed to do so by the Council, the TAC shall make recommendations to the Council concerning the modification of the Framework or the elaboration of protocols.
10. The TAC shall perform such other functions as may from time to time be assigned to it by the Council.

SECTION E. SECTORAL ADVISORY COMMITTEES

Article 27

Structure and Procedures

1. Sectoral Advisory Committees ("SACs") may be established by the Council to deal with specific sectoral matters within the competence of the Commission.
2. Unless the Council decides otherwise, a SAC shall be composed of one member from each Nile Basin State who is an expert in the field of activity of the SAC in question.
3. SACs shall be governed by the rules and procedures applicable to the TAC, *mutatis mutandis*.
4. The Council may establish a SAC charged with establishing linkage between sub-basin organizations and the Commission.

Article 28

Functions

SACs shall discharge the tasks assigned to them by the Council.

SECTION F. THE SECRETARIAT

Article 29

Structure

1. The Secretariat shall be headed by an Executive Secretary who shall be appointed for a three year term by the Council.
2. The Executive Secretary shall be accountable to the Council through the TAC.
3. The Executive Secretary and the officials of the Secretariat shall enjoy in Nile Basin States the privileges and immunities necessary for the performance of their functions.
4. The staff and structure of the Secretariat shall be determined by the Council on the recommendation of the TAC, taking into account the principle of geographic distribution.
5. The office of the Secretariat shall be situated at the Headquarters of the Commission.

Article 30

Functions

1. The Executive Secretary shall represent the Commission as to matters specified in the rules and procedures governing its operations and in particular in its relations with international and bilateral assistance institutions and with any Nile sub-basin institutions or arrangements.
2. The Secretariat shall serve as the secretariat for meetings of all organs of the Commission.
3. The Executive Secretary shall be responsible for the administration and finances of the Commission.
4. The Executive Secretary shall prepare, taking into account any information provided by National Nile Focal Point Institutions, and shall submit reports to the TAC concerning the annual work programs of the Commission.
5. The Executive Secretary shall prepare a proposed budget of the Commission and submit it to the TAC.
6. The Executive Secretary shall be responsible for the carrying out of studies and the performance of other activities proposed by the TAC and authorized by the Council. The Executive Secretary may engage consultants with the approval of the TAC to assist in the performance of these functions.
7. The Secretariat shall assist the TAC with the preparation of a plan for the coordinated, integrated, and sustainable management and development of the Nile River Basin.

8. The Secretariat shall provide other assistance to all organs of the Commission, on their request, concerning matters related to the discharge of their functions.

9. The Secretariat shall compile available data and information and coordinate monitoring of information relating to the Nile Basin, including information concerning water resources, the environment and socio-economic matters, reviews and synthesizes the information with a view to integrating it into basin-wide databases and establishing standards, and develops mechanisms for the regular exchange of information where needed.

10. The Secretariat shall receive reports from sub-basin organizations and transmits the reports to TAC for its consideration.

11. The Secretariat shall perform any other functions assigned to it by the TAC.

SECTION G.

SUCCESSION OF THE NILE RIVER BASIN COMMISSION TO THE NILE BASIN INITIATIVE

Article 31

Succession

Upon the entry into force of this Framework the Commission shall succeed to all rights, obligations and assets of the Nile Basin Initiative (NBI).

PART IV. SUBSIDIARY INSTITUTIONS

Article 32

Sub-Basin organizations and arrangements

1. Nile Basin States shall recognize the utility of sub-basin organizations and arrangements.
2. The parties to the Framework that are also members of sub-basin organizations or arrangements shall undertake to ensure that the purposes, functions and activities of such organizations and arrangements are consistent with those of the Nile River Basin Commission and with the principles and rules set out in, or adopted under, the Framework.
3. The parties to the Framework that are also members of sub-basin organizations or arrangements further undertake to ensure that such organizations or arrangements work in close cooperation with the Nile River Basin Commission.
4. The Nile River Basin Commission shall maintain regular contact, and shall cooperate closely, with any sub-basin organization or arrangement.

Article 33

National Nile Focal Point Institutions

1. Each Nile Basin State shall establish or designate a National Nile Focal Point Institution and notify the Commission thereof.
2. The function of National Nile Focal Point Institutions shall serve as national focal points for the Commission with regard to matters within the competence of the Commission.

PART V. MISCELLANEOUS PROVISIONS

Article 34

Settlement of disputes

1. In the event of a dispute between two or more Nile Basin States concerning the interpretation or application of the present Framework, the States concerned shall, in the absence of an applicable agreement between them, seek a settlement of the dispute by peaceful means in accordance with the following provisions:

(a) If the States concerned cannot reach agreement by negotiation requested by one of them, they may jointly seek good offices, or request mediation or conciliation by, the Nile River Basin Commission or other third party, or agree to submit the dispute to arbitration, in accordance with procedures to be adopted by the Council, or to the International Court of Justice.

(b) If after six months from the time of the request for negotiations referred to in paragraph 2, the States concerned have not been able to settle their dispute through negotiation or any other means referred to in paragraph 2, the dispute shall be submitted, at the request of any of the parties to the dispute, to impartial fact-finding in accordance with the Annex on the fact-finding Commission, unless the States concerned otherwise agree.

Article 35

Supplementary instruments

1. Nile Basin States may adopt bilateral or multilateral instruments that supplement the present Framework, concerning portions of the Nile River Basin or the Nile River system, such as sub-basins and tributaries, or concerning individual projects or programs relating to the Nile River Basin or the Nile River system, or portions thereof.

2. The supplementary instruments referred to in paragraph 1 shall apply the principles of the present Framework to the subject matter of those instruments.

3. Any other instruments or arrangements entered into by the Nile Basin States shall not be inconsistent with the provisions of the present Framework.

4. Supplementary instruments may be adapted as Protocols to the present Framework by consensus by Nile Basin States.

PART VI. FINAL CLAUSES

Article 36

Amendment of the Framework or Protocols

1. Amendments to this Framework may be proposed by any State Party. Amendments to any protocol may be proposed by any State to that protocol.
2. Amendments to this Framework shall be adopted at a meeting of the State Parties. Amendments to any protocol shall be adopted at a meeting of the State Parties to the Protocol in question.
3. Articles 1, 2, 3, 4, 5, 8, 9, 14, 23, 24, 34, 35, 36 and 37 of the present Framework may be amended only by consensus. As to proposed amendments to other articles or to any protocol, the Parties shall make every effort to reach agreement by consensus. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall as a last resort be adopted by a two-thirds majority vote of the State Parties to the instrument in question present and voting at the meeting, and shall be submitted by the Depositary to all State Parties for ratification, acceptance or approval.

Article 37

Adoption and Amendment of Annexes

1. The annexes to this Framework or to any protocol shall form an integral part of the Framework or of such protocol, as the case may be, and, unless expressly provided otherwise, a reference to this Framework or its protocols constitutes at the same time a reference to any annexes thereto. Such annexes shall be restricted to procedural, scientific, technical and administrative matters agreed upon by the parties.
2. Except as may be otherwise provided in any protocol with respect to its annexes, the following procedure shall apply to the proposal, adoption and entry into force of additional annexes to this Framework or of annexes to any protocol:
 - (a) Annexes to this Framework or to any protocol shall be proposed and adopted according to the procedure laid down in Article 36. In particular, any annex relating to one of the articles listed in paragraph 3 of Article 36, which may be amended only by consensus, must be adopted by consensus;
 - (b) Any Party that is unable to approve an additional annex to this Framework or an annex to any protocol to which it is Party shall notify the Depositary, in writing, within one year from the date of the communication of the adoption by the Depositary. The Depositary shall without delay notify all Parties of any such declaration of objection received. A Party may at any time withdraw a previous declaration of objection and the annexes shall thereupon enter into force for that Party subject to subparagraph (c) below;
 - (c) On the expiry of one year from the date of the communication of the adoption by the Depositary, the annex shall enter into force for all Parties to this Framework or to any protocol concerned which have not submitted a notification in accordance with the provisions of subparagraph (b) above.

3. The proposal, adoption and entry into force of amendments to annexes to this Framework or to any protocol shall be subject to the same procedure as for the proposal, adoption and entry into force of annexes to the Framework or annexes to any protocol.

4. If an additional annex or an amendment to an annex is related to an amendment to this Framework or to any protocol, the additional annex or amendment shall not enter into force until such time as the amendment to the Framework or to the protocol concerned enters into force.

Article 38

Relationship between this Framework and Its Protocols

1. A State may not become a party to a protocol to this Framework unless it is, or becomes at the same time, a party to this Framework.

2. Decisions under any protocol shall be taken only by the Parties to the protocol concerned. Any Nile Basin State that has not ratified a protocol may participate as an observer in any meeting of the parties to that protocol.

Article 39

Reservations

No reservations may be made to this Framework.

Article 40

Withdrawal

1. At any time after two years from the date on which this Framework has entered into force for a State Party that State Party may withdraw from the Framework by giving written notification to the Depositary.

2. Any such withdrawal shall take place upon expiry of one year after the date of its receipt by the Depositary, or on such later date as may be specified in the notification of the withdrawal, during which period the notifying State shall continue to be bound by the Framework.

3. Any State Party which withdraws from this Framework shall be considered as also having withdrawn from any protocol and annex to which it is party.

4. Any State Party which withdraws from this Framework shall, before withdrawing, settle its outstanding obligations thereunder.

5. The provisions of this article shall apply to withdrawal from protocols to the Framework.

Article 41

Signature

The present Framework shall be open for signature by all States in whose territory part of the Nile River Basin is situated, from 14th May 2010 to 13th May 2011 at Entebbe, Uganda.

Article 42

Ratification or Accession

The present Framework is subject to ratification or accession by all States in whose territory part of the Nile River Basin is situated. The instruments of ratification or accession shall be deposited with the African Union.

Article 43

Entry into Force

The present Framework shall enter into force on the sixtieth day following the date of the deposit of the sixth instrument of ratification or accession with the African Union.

Article 44

Authentic Texts, Depositary

The original of the present Framework, of which the English and French texts are equally authentic, shall be deposited with the African Union, which shall send certified true copies thereof to the State Parties.

Article 45

Functions of the Depositary

The Depositary shall, in particular, inform the State Parties:

- (a) Of the deposit of instruments of ratification or accession, or of any other information, declarations or other instruments provided for in the present Framework.
- (b) Of the date of the entry into force of the present Framework.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed the present Framework.

Done at ENTEBBE, UGANDA.

Democratic Republic of Congo

Name: Name: _____

Title: Title: _____

Date: Date: _____

Republic of Burundi

Name: Name: _____

Title: Title: _____

Date: Date: _____

Arab Republic of Egypt

Name: Name: _____

Title: Title: _____

Date: Date: _____

The State of Eritrea

Name: Name: _____

Title: Title: _____

Date: Date: _____

Republic of Kenya

Name: Name: _____

Title: Title: _____

Date: Date: _____

Federal, Democratic of Ethiopia

Name: Name: _____

Title: Title: _____

Date: Date: _____

Republic of Rwanda

Name: Name: _____

Title: Title: _____

Date: Date: _____

The Republic of Sudan

Name: Name: _____

Title: Title: _____

Date: Date: _____

The United Republic of Tanzania

Name: Name: _____

Title: Title: _____

Date: Date: _____

Republic of Uganda

Name: Name: _____

Title: Title: _____

Date: Date: _____

Annex**Fact-Finding Commission**

1. A Fact-finding Commission shall be established, composed of one member nominated by each State concerned and in addition a member not having the nationality of any of the States concerned chosen by the nominated members who shall serve as Chairman.
2. If the members nominated by the States are unable to agree on a Chairman within three months of the request for the establishment of the Commission, any State concerned may request the Chairperson of the Commission of the African Union (AU) to appoint the Chairman who shall not have the nationality of any of the parties to the dispute or of any of the Nile Basin States concerned. If one of the States fails to nominate a member within three months of the initial request pursuant to paragraph 2 of Article 33 above, any other State concerned may request the Chairperson of the AU Commission to appoint three persons who shall not have the nationality of any of the parties to the dispute or of any of the Nile Basin States concerned.
3. The Commission shall determine its own procedure.
4. The States concerned have the obligation to provide the Commission with such information as it may require and, on request, to permit the Commission to have access to their respective territory and to inspect any facilities, plant, equipment, construction or natural feature relevant for the purpose of its inquiry.
5. The Commission shall adopt its report by a majority vote and shall submit that report to the States concerned setting forth its findings and the reasons therefore and such

recommendations as it deems appropriate for an equitable solution of the dispute, which the States concerned shall consider in good faith.

6. The expenses of the Commission shall be borne equally by the States concerned.

Annex on Article 14(b) to be resolved by the Nile River Basin Commission within six months of its establishment

At the end of the negotiations, no consensus was reached on Article 14(b) which reads as follows: *not to significantly affect the water security of any other Nile Basin State*, all countries agreed to this proposal except Egypt and Sudan.

Egypt proposed that Article 14(b) should be replaced by the following wording:

(b) not to adversely affect the water security and current uses and rights of any other Nile Basin State.

The Extraordinary Meeting of the Nile Council of Ministers held in Kinshasa, the Democratic Republic of Congo, on 22 May 2009 resolved that the issue on the Article 14(b) be annexed and resolved by the Nile River Basin Commission within six months of its establishment.

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